FILED

(1) 97 • 422 JUL - 3 1997

OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of the United States
October Term, 1997

BENJAMIN M. ANDERSON,
an individual;

Petitioner,
v.

SAMUAL W. PANOS,
an individual;
KATHRYN DOBRINIC,
in individual capacity;
MICHEAL SHEELEY,
in individual capacity;
JAMES VAZZI,
in individual capacity;
BOATMENS NATIONAL BANK OF CENTRAL ILLINIOS (Now NATIONS BANK),
a Corporation;
COFFEEN STATE BANK AND TRUST COMPANY (Now ILLINI BANK),
a Corporation;

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

David M. Kahn
Counsel of Record
229 S. Main Street
P.O. Box 68
Waterloo, Illinios 62298
(618) 939-6013

59 pp

QUESTIONS PRESENTED

1. Whether a person who under duress and coercion pleads guilty to a misdemeanor but is not thereafter incarcerated, and who although placed on a conditional discharge, for two years, (until January 12, 1997) but with few restrictions on his freedom is in custody for purposes of being able to make application for writ of habeas corpus?

2. Whether a person who was illegally convicted, but who was never been able to bring a habeas corpus action, because he was never in custody, is that person required by the holding of Heck v. Humphrey, to have the conviction set aside before pursuing a Title 42 §1983 claim, for money damages for serious constitutional violations such as 1) Guilty plea being obtained by coercion and duress, 2) An alleged totally false and fabricated transcript of the sentencing hearing which transcripts shows that he was advised of various constitutional and procedural rights 3) Payment of restitution that in no way or manner is related to the offense charge with 4) Search without consent or search warrant of the property of the person convicted as well as the search of separate property of his father and adult daughter, and further the concealing of the search of these properties , 4) undisputed payment of substantial fine and restitution, as part of the criminal conviction.

3. Whether the holding of Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.E.d.2 383 (1994) bars constitutional injuries that does not impeach the validity of a conviction that has not been set aside.

LIST OF PARTIES

I. Parties to this law suit are:

Benjamin M. Anderson	Petitioner
Michael Sheeley, in his individual capacity only	Respondent
Kathryn Doberenic, sued only in her individual capacity	Respondent
James Vazzi, sued only in his individual capacity	Respondent
Boatmen's National Bank of Central Illinois, (Now Nations Bank)	Respondent
Samuel W. Panos	Respondent
Illinois Bank, (formerly Coffeen State Bank and Trust Company)	Respondent

II. List of All Parties in the Appellate Court

Benjamin M. Anderson,	Petitioner, Plaintiff-Appellant
and	
David M. Kahn,	Plaintiff-Appellant
vs.	
County of Montgomery	Defendant-Appellant
Michael Sheeley, in his individual capacity only	Defendant-Appellant

Kathryn Doberenic, sued individually and in her official capacity as Montgomery County States Attorney	Defendant-Appellant
James Vazzi sued individually and his official capacity as Montgomery County Sheriff	Defendant-Appellant
Boatmen's National Bank of Central Illinois, (Now Nations Bank)	Defendant-Appellant
Kelly D. Long	Defendant-Appellant

(Petitioner is not appealing entry of summary judgment in regards to the following Defendants in whose favor Summary Judgment was entered, County of Montgomery, Katheryn Doberenic in her official capacity, James Vazzi in his official capacity only, and Kelly D. Long. Also David M. Kahn, is not appealing sanctions assessed against him.] Although the First Amended Complaint only sued Michael Sheehy in his individual capacity, to the extent that there my have been summary judgment entered in his favor in his official capacity, same is not being appealed.)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

LIST OF PARTIES TO THE PROCEEDINGS..... ii-iv

TABLE OF CONTENTS..... iv-v

TABLE OF AUTHORITIES..... vi-viii

PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AND FEDERAL AND STATE STATUTES INVOLVED..... 1-5

STATEMENT..... 5-11

REASONS FOR GRANTING THE PETITION.....11-21

CONCLUSION.....21

APPENDIX.....App. 1-22

A. Court of Appeals Decision Affirming Summary Judgment.....App. 1-14

B. Initial District Court Opinion, Entering Summary Judgment.....App. 15-20

C. District Court Order Petitioners motion For Reconsideration.....App. 21-22

Page

D. District Court Order Record Correcting record To The Extent that it was not implicitly asserted that a Judge was part of a conspiracy.....App. 23-24

E. Federal Court of Appeals Decision denying Motion For Enlargement of Time in which To File Petition For Rehearing En Banc.....App. 25

F. Montgomery County Circuit Court Order Denying relief under Post Conviction hearing act, 725 ILCS 5/122-1 and 5/122-2.....App. 26-27

G. Montgomery County Circuit Court Order Denying cause of action pursuant to 735 ILCS § 2-1401, of the Illinois Civil Practice to set aside Conviction.....App. 28

H. Montgomery County Circuit Court Order Denying Motion to Reconsider order denying cause of action, pursuant to 735 IICS §2-1401.....App. 29

TABLE OF AUTHORITIES

Page

Constitution of the United States

Article I § 9.....1

Fourth Amendment.....2

Fifth Amendment..... 2

Sixth Amendment.....2

Eighth Amendment.....2

The Fourteenth Amendment.....2

Cases

Creek v. Clark, 88 Ill.2d 54,
429 N.E.2d 1199,(1981).....16

Heck v. Humphrey, 512 U.S. 477,
114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994).....1, 11, 13,

Fay v. Noia, 372 U.S. 391, 83
S.Ct 822, 9 L.E.2d 837 (1963).....15

Flowers v. Hanks, 941 F.Supp 765
(N.D. Ind. 1996).....19

Griffin V. Endicott, 932 F.Supp.231
(E.D.Wis. 1996).....19

Jones v. City of Chicago, 586 F.2d 985,
(7th Cir. 1988).....18

Page

Jones v. Cunningham, 371 U.S. 236
83 S.Ct 373, 9 L.Ed.2d 285 (1963).....11, 14, 15

Lindh v. Murphy, 117 S.Ct 2059,
138 LE.d 481, (1997).....19

People v. Fontana, 251 Ill. App.
3d 694, 622 N.E.2d 893 (1993)..... 17

People v. Warr, 54 Il 2d 487,
298 N.E. 2d 164, (1973)..... 16

People Ex Rel. Williams v.
Morris, 44 Ill.App.3d 39, 357
N.E.2d 851 (1976)..... 15

Post v. Gilmore, 117 F.3d 556, (7th Cir. 1997).. 18

Schilling v. White, 58 F.3d 1081,
1086, (6th Cir. 1995)..... 12, 20

United States Ex Rel. Dessus v.
Commonwealth of PA, 452 F.2d 557 (1971)..... 15

Statutes of the United States

28 U.S.C §1254(1)..... 1

Habeas Corpus Act, 28 U.S.C. 2241..... 13

Habeas Corpus Act, 28 U.S.C. 2242..... 3,13

Habeas Corpus Act, 28 U.S.C. 2244
As amended April 24, 1966.....3,13,18, 19

Habeas Corpus Act, 28 U.S.C. 2254
as amended April 24, 1966.....3, 19

Page

42 U.S.C. § 1983..... 13

Illinois Compiled Statutes

725 ILCS 5/122-1 and 5-122-2..... 5,16

730 ILCS 5/5-6-1 (b)..... 4

730 ILCS 5/5-6-3..... 4

730 5/5/6-4..... 4, 15

735 ILCS § 2-1401..... 6

PETITION FOR WRIT OF CERTIORARI

Petitioner, Benjamin M. Anderson, an individual respectfully petitions for a writ of certiorari issue to review the judgment, of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, App. is reported at 111 Fed. 3rd at page 494. The opinions and orders of the district court, App. 15-24 is not reported.

JURISDICTION

The Judgment of the court of appeals was entered on April 4, 1997, App. 1, The judgment being appealed from concerns stating a cause of action under 42 U.S.C. 1983 for money damages where the underlying conviction has not been set aside. A "motion for enlargement of time in which to file petition for rehearing en banc was denied on April 23, 1997" by the court of Appeals, App. 25 was denied as untimely. On July 7, 1997, writ of Certiorari was filed, but was rejected for failure to comply with the Rules of this court, and Petitioner was allowed to submit a revised writ of certiorari within 60 days of letter of July 11, 1997 from the Clerk of the Supreme Court. Jurisdiction of this Court is invoked, under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States Article I § 9, provides in part, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fourth Amendment to the United States Constitution provides, in part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

3. The Fifth Amendment to the United States Constitution provides, in part:..."nor be deprived of life, liberty, or property without due process of law".

4. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

5. The Eighth Amendment to the United States Constitution provides in part..."Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted".

6. The Fourteenth Amendment to the United States Constitution Section I provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law;...."

7. The Habeas Corpus Act, 28 U.S.C. 2241, (C) refers to custody provides in part: "The writ of habeas corpus shall

not be extended to a prisoner unless--"

(3) He is in custody in violation of the Constitution or laws of the United States."

8. The Habeas Corpus Act, 28 U.S.C. 2242 provides in part"

> ....."It [application for a writ of habeas corpus], shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtues of what claim or authority if known."

9. The Habeas Corpus Act, 28 U.S.C. 2244, As amended April 24, 1966 Pub.L. No. 104-132, Title I §§ 101, 106, 110 stat. 1217, 12201 provides in part:

> "(d)(1) A 1 year period of limitation shall apply to an application of a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court."....

10. The Habeas Corpus Act, 28 U.S.C. 2254, As amended April 24, 1966, Pub.L. No. 104-132, Title 1 § 104, 110 stat. 1218 provides in part:

> "(b)(1) "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that--.

11. 42 U.S.C. § 1983 provides in part: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress,...."

12. That Chapter 730 Illinois Compiled Statutes (ILCS) 5/5-6-1 (b) Statutes, provides in part:

> "The court may impose a sentence of conditional discharge for an offense if the court is of the opinion that neither a sentence of imprisonment nor of periodic imprisonment nor of probation supervision is appropriate."

(A) That 730 ILCS 5/5-6-3 provides in part:

"(a) The conditions of probation and of conditional discharge shall be that the person:"

"(1) not violate any criminal statue of any jurisdiction."

"(2) report to or appear in person before such person or agency as directed by the court;"

"(3) refrain from possessing a firearm or other dangerous weapon;"

"(4) not leave the State without the consent of the court or, in circumstances in which the reason for the absence is of such an emergency nature that prior consent by the court is not possible, without the prior notification and approval of the person's probation officer;"

"(5) permit the probation officer to visit him at his home or elsewhere to the extent necessary to discharge his duties; and"

"(6) perform no less than 30 hours of community service and not more than 120 hours of community service.....".

(B) That 730 ILCS 5/5-6-3, subsection (6)(b), contains a list of other obligations and restrictions that the Court may impose.

(C) That 730 ILCS 5/5-6-4 provides in part:
Subsection (b) "The court shall conduct a hearing of

the alleged violation. The court shall admit the offender to bail pending the hearing ....."

Subsection (c) "The state has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence. The evidence shall be present in open court with the right of confrontation, cross-examination, and representation by counsel."

Subsection (d) "Probation, conditional discharge, periodic imprisonment and supervision shall not be revoked for failure to comply with condition of a sentence or supervision, which imposes financial obligations upon the offender unless such failure is due to his willful refusal to pay."

STATEMENT

I. SUMMARY OF PROCEEDINGS

This was an action for damages brought by Petitioner because of duress and coercion he pled guilty, he was not advised as any of his rights at the time of sentencing including rights to confront witnesses, and to file an appeal. He never appeared before a Judge at the time of sentencing contrary to an alleged false transcript according to which he was fully advised as to his rights, by the Judge who imposed sentence. Further restitution was ordered to be paid to two banks, although there was no causal relationship between what Petitioner was criminally charged with and the restitution.

After summary judgment was entered by the District Court but prior to same being upheld by the Appellate Court, Kahn filed a motion to set aside Judgment, Sentence and Fine, under Post Conviction Hearing Act, pursuant to 725 ILCS 5/122-1 and 5-122-2 but same was denied on August 19, 1996 as being untimely App. 26-27 since it was not filed within four months, of conviction. (four month limitation applied since this was a misdemeanor conviction rather than

felony conviction). Thereafter Petitioner filed for relief pursuant to 735 ILCS § 2-1401 of the, Illinois Code of Civil Procedure. On February 26, 1997, the Montgomery County Circuit Court entered the an order denying relief sought App. 28. On June 10, 1997, Petitioner's motion requesting reconsideration of the Court's ruling of February 26, 1997, was denied. App. 29.

On July 10, 1997, Petitioner filed notice of appeal from order denying reconsideration, and case is pending in the 5th District Appellate Court of Illinois, under the caption of People of the State of Illinois, Plaintiff-Appellate v. Benjamin M. Anderson, Defendant Appellant, Appellate No. 5-97-0487. (During oral arguments the Appellate inquired as to the status of Post Judgment Proceedings; it also should be noted that all three State Court Orders set forth in the appendix pages 15-24 were all entered after summary Judgment was entered by the District Court and two of these Orders were only recently entered, and it is for this reason they were not previously made part of the record).

2. SUMMARY OF FACTS

This was an action for damages brought by Petitioner because of duress and coercion he pled guilty, he was not advised as any of his rights at the time of sentencing including rights to confront witnesses, and to file an appeal. He never appeared before a Judge at the time of sentencing contrary to a false transcript according to which he was fully advised as to many of his rights. Further restitution was ordered to be paid to two banks, although there was no causal relationship between what Petitioner was charged with and the restitution.

The facts as recognized by the Court appeals opinion are set forth below in the instances where Petitioner disagrees with these facts, the disagreement is shown in brackets.

Anderson was a resident of Missouri, he moved to Florida and used alias name of "Buddy Dane Blaylock" to avoid child support. He moved back to Missouri and then Illinois to avoid child support Anderson assumed the alias of "Terry Lee Cain."

"While in Illinois, using the phony Cain name, Anderson purchased several vehicles and equipment with financing by defendants Boatmen's National Bank of Central Illinois and Illinois Bank (a/k/a Coffeen State Bank and Trust Co.)," [Petitioner also purchased under the name of Cain a farm financed by Boatmen's National Bank of Central Illinois, which loan was paid in full, without threat of criminal prosecution or a civil suit]. Anderson put some money down and made a few monthly payments, but he soon stopped paying and left Illinois (or so it seems) with some of the goods, [approximately 8-10 payments were made]. Attorney Kelly D. Long, a defendant here, represented Boatmen's in a lawsuit brought to recover Anderson's debt or repossess some of the encumbered equipment.

"In February of 1993 an indictment issued in Montgomery County, Illinois, charging Anderson with providing a false name to obtain, by deception financing on some of the equipment valued at over $10,000.00 with the intent to deprive the lender of its interest in the property. [Petitioner was indicted only in regards to one piece of equipment a Case uni-loader]. The charge, a felony, was followed by the issuance of a warrant for Anderson's arrest. [The warrant was sealed and no attempt was made to serve the Warrant until a year later; the warrant was not placed with NCIC or other law enforcement agencies, further Agent Sheeley knew where the Defendant was and did not advise local authorities, local authorities found out about the warrant from Anderson's former Wife.] After waiving extradition, he was driven to Illinois by Montgomery County Sheriff James Vazzi and Special Agent Michael Sheeley of the Illinois State Police, two more defendants in this case. Back in Illinois, apparently after

stewing in jail for 26 days, [Anderson only served a total of more than 13 or 14 days in jail and of those 6 or 7 days was in the Franklin County Missouri Jail; Petitioner was arrested in Franklin County, Missouri].

Attorney (and yes, defendant) Samuel Panos represented Anderson on the theft charge, and Kathryn Doberinic another defendant, prosecuted the case for Montgomery County. The parties negotiated what would appear to be a good deal, a plea of guilty to a lesser charge of theft under $300.00 a misdemeanor in Illinois." [Petitioner disagrees with this as the State could not prove him guilty beyond a reasonable doubt and in fact he is innocent.] "On January 12, 1995, Anderson signed a document entitled "Jury Waiver and Plea of Guilty," admitting his guilt on the charge, as well as a document entitled "Judgment and Sentence/Conditional Discharge," which set out the penalty he received--26 days of incarceration, (fully offset by the 26 days he spent in jail), [Anderson only spent 13 or 14 days in jail and only six or seven of them were at the Montgomery County Jail], and 24 months conditional discharge, a fine of $1,100.00 and restitution totaling $6,930.72 to the two banks." "Part of the restitution was satisfied out of the bail money posted by Anderson's father." "The state court conviction, to this day, has not been vacated."

"Anderson feels that his guilty plea in the case was coerced by Panos and Dobrinic." "He admits he signed the guilty plea document but claims he never appeared before a judge to be informed of his rights." [Defendant was advised by his Attorney that he had to plead guilty or receive three years in the penitentiary, and State's Attorney Doberenic said that the guilty plea had to be done on that day, January 12, 1995 because Agent Sheeley was out of town]. This assertion, though, is drawn into serious question by the existence of a court transcript in which "Benjamin Anderson" (a/k/a Blaylock or Cain), represented by Attorney Samuel Panos, is questioned on the record, enters a guilty plea, and

receives a sentence." "Anderson claims that the transcript was fabricated by Panos, Dobrinic and a court reporter, (he does not allege that the state court judge participated in the false-transcript scheme)," [Petitioner believes that Panos participated in the false transcript scheme only through his silence, and that he was not aware of same until Kahn called attention to the false transcript in his Motion of May 1996 that there was a false transcript]. Anderson's contention on this point is supported by four affidavits (his, his father's and two friends), which say he was outside the courtroom having a cigarette at the time indicated on the transcript, so he could not have been in court". [Petitioner also called to the attention of the Appeals Court but not to the District Court's attention to two docket sheets in which a difference pattern of words is used, when Petitioner appeared before Judge Slater in a civil case on January 12, 1997, (word appears is used), and when he allegedly appeared before Judge Slater to be sentenced to the misdemeanor charged].

"Although not included in the actual recitation of claims, interpreting the amended complaint in Anderson's favor, various factual assertions additionally accuse someone in Missouri of denying him a right to counsel before being extradited, Sheeley of conducting an illegal search of Anderson's residence, and Sheeley and Vazzi of recklessly endangering Anderson's life by driving 95 miles an hour in a squad car while transporting him from Missouri to Illinois after he waived extradition." [Petitioner waived extradition but did so without the benefit of Counsel who he was kept from seeing].

On page 9 of the App. the Appellate court states: "reading the complaint in his favor, some of the facts could be construed as a claim for illegal search when Officer Sheeley walked around Anderson's property. But Anderson failed to claim or indicate how any such search harmed him or whether it was in fact a "search". "He did not allege that Sheeley did any damage by walking around or that anything was seized."

"In his May 13, 1996, responses to some of the motions to dismiss, Anderson, via Kahn first raised the idea that Anderson never appeared before a Judge for sentencing and that the transcript indicating that he did so was a fake, as well as an assertion that Sheeley and Dobrinic misled the grand jury in securing the original indictment". [It was not until May 1996 that Kahn realized there was a false transcript, when as a matter of routine Kahn ordered the transcript, and when the transcript was received, Anderson advised him that it was fabricated since he (Anderson) did not appear before a Judge in conjunction with his sentencing; until the fabricated transcript was received Anderson had no reason to suspect that there was a transcript].

The Court severely criticizes Kahn, and Kahn admits that the criticism was justified, and he no longer contesting sanctions that were assessed against him, in the amount of $9,681.95 and realizes that the sanctions could have been much more severe. Non-the-less, there are a couple of matters in which the Appellate Court is believed to be in error the most serious one being that the Court on page 5 of the App. where it is stated that the grand total that Anderson purportedly sought was more than a half billion ($500,000,000.00) dollars. The amount the Court stated is incorrect. The correct grand total of all claims that Defendant sought were, no where near half a billion dollars. At the very most, including damages in different Counts (including some of which were duplicative, and damages sought against a Defendant who was dismissed, the grand total was less than seventy five million dollars). This point is raised because alleging that the damages sought were over half a billion dollars, is totally ridiculous, and tends to further undermine Kahn's credibility. The other matter on which Kahn disagrees with the Appellate Court findings is a minor one,

On App. page 10 the Court states Kahn thought that mailing something on the date due was the same a filing it on that date. The court overlooked that the extensions granted

Kahn, specifically allowed him to use the mailing date or the filing date.

The Appellate Court upheld the District Courts Judgment for two reasons, 1) Heck v. Humphrey, bars stating a § 1983 claim, until the underlying conviction is set aside, unless 2) There are substantial constitutional injuries that are not related to the conviction. The court found that there were constitutional injuries but that these constitutional injuries were not significant. The primary constitutional injures alleged by Petitioner that are not related to his conviction are : 1) Search of his property his father's property and his daughter's property in conjunction with the investigation of him and thereafter the concealment of this search; The Court believes this search was not significant Petitioner disagrees and notes that Agent Sheeley a State of Illinois Police Officer was out of his physical jurisdiction in searching property in Missouri. 2) A false and fabricated transcript, (The false and fabricated transcript was not the cause of Petitioner's pleading guilty as he admittedly plead guilty); however the Courts below found allegations of a false and fabricated transcript to be without any merit.

REASONS FOR GRANTING THE PETITION

I. Habeas Corpus Relief was not available because the Petitioner was not in custody.

Summary Judgment was granted and upheld on appeal against Petitioner's assertion of a 42 U.S.C. §1983 cause of action, in that Heck v. Humphrey, 512 U.S. 4 114 S.CT. 2364, 129 L.Ed.2d 383 (1994), at page 512 U.S. at 487, 114 S.Ct at 2372, holds as noted by the Court of Appeals in the Case at bar, App. page and see 111 F.3d 494, (7th Cir. 1997) at page 498 holds:

"that when a Section 1983 claims requires a finding that a

criminal conviction (or sentence) was invalidly obtained, no cause of action lies unless the conviction (or sentence) that would be impugned has already been "reversed on direct appeal, expunged by executive order, invalidated by a state tribunal authorized to make such a determination, or called into question by a federal court's grant of a writ of habeas corpus."

The Court of Appeals notes that case of Schilling v. White, 58 F.3d 1081, 1086, (6th Cir. 1995), applies as to persons no loner incarcerated." In the case at bar after being sentenced the Petitioner was never incarcerated. The court sentenced Petitioner to 26 days, but incorrectly gave Petitioner Credit for 26 days already served. The fact that Petitioner was given credit for time he did not serve is irrelevant unless the Petitioner is arrested for time not served, in which event Petitioner would have a right to file a writ of habeas corpus. If the Petitioner had appeared before the sentencing Judge, he would have advised him that he only was incarcerated after being arrested, and prior to being sentenced for a total of 13 or 14 days, of which only six of seven was served at the Montgomery County Jail. In Schilling, there was an opportunity to bring habeas corpus during actual period of incarceration after being sentenced, Anderson on the other hand after being sentenced never had served any jail time.

On App. page 7, the Court notes the case of Jones v. Cunningham, 371 U.S. 236 83 S.Ct 373, 9 L.Ed.2d 285 (1963), "the strong possibility" that conditional discharge made Petitioner eligible for habeas corpus relief. As set forth below that unlike the person on paroled in the Jones, supra there ere very few restrictions on the Petitioner, and those restrictions were of a minor nature. Moreover Petitioner unlike the Petitioner in Jones, was entitled to a impartial hearing before a Judge, with various procedural safeguards prior to his conditional discharge being revoked or modified.

The requirement of custody is noted in various Habeas Corpus Statutes: 28 U.S.C. 2241 refers to person in custody in violation of the Constitution or laws of the United States; 28 U.S.C. 2242, inquires into the facts of commitment or detention as well as the person who has custody and under what authority; 28 U.S.C. 2244, as amended April 24, 1996, establishes time limitations for a person in custody has to seek habeas corpus relief; 28 U.S.C 2254, in (b)(1)specifies that an applicant for writ of habeas corpus has to be in custody.

Heck v. Humphrey, supra was a close decision, with four justices disagreeing with the holding. It is believed that if habeas corpus relief safeguard was never available to a Petitioner, the Court would then allow the Petitioner to assert a §1983 claim in regards to an alleged invalidly obtained conviction without first having that conviction set aside.

The Illinois Statutes pertaining to conditional discharge, sets forth the restrictions a person on conditional discharge is subject to. Further the Judgment of Conditional Discharge, struck out several conditions, pertaining to Petitioner, the restrictions struck out were, 1) Reporting to or appearing in person before the Montgomery County Probation Officer 2) Keeping the Montgomery County Probation Officer advised of his address, 3) not leaving the State without consent of the Court 4) Permitting the Probation officer to visit the Defendant.

The restrictions that the Judgment, and Sentence Conditional Discharge imposed are not to:

1. Not to violate any criminal statute of any jurisdiction;
2. Keeping the Montgomery County clerk advised of his address and reporting any change of address within twenty four hours.
3. Refrain from possessing a firearm or other deadly weapon;

4. Report to the Court whenever notice for the Clerk of this Court is sent by U.S. Mail to defendant's last reported address.

5. To Pay to the Clerk of the court a fine of $1,100.00 and restitution as specified; to also make monthly restitution payments to the Court.

6. Also provided for serving of 26 days in Montgomery County jail, but this was offset by giving credit for 26 days served, (In fact Petitioner only served 13 or 14 days in regards to the charges filed against him, and only six or seven of those days were at the Montgomery County Jail).

Although there was a place on the Judgment and Sentence and Conditional Discharge, for other restrictions no other restrictions or conditions were placed on the Petitioner. During the time of two year conditional discharged that expired on January 12, 1997, the Petitioner never reported to anyone in regards to if he was complying with the terms of the conditional discharged.

Further 730 ILCS 5/5/-6-1(b), provides for imposition of conditional discharged sentence, only if the Court believes neither incarceration, or probation is appropriate.

In Jones v. Cunningham, supra in that case the Petitioner was on parole and was placed by the state court order in the "custody and control" of the Parole Board and directed to live with specified relatives. Further in Jones, supra "It [court order] provides that his court order was subject to revocation or modification at any time by the Parole Board and that petitioner could be arrested and returned to prison for cause. In Jones, supra there were restrictions on operating a motor vehicle, and changing residence. The Court in Jones, supra, at page 242 of U.S. 371, in footnote 19, "Even the condition which requires petitioner not to violate any penal laws or ordinance, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a

violation occurred". In Illinois however, the court is obligation to find that a person on conditional discharge has in fact violated the law, pursuant to Illinois, pursuant to applicable portions 730 ILCS 5/5-6-4 (b) (c) and (d) set out on pages 4-5: "The state has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence." "The evidence shall be presented in open court with the right of confrontation, cross-examination, and representation by counsel." "Further if Petitioner did pay restitution, before conditional discharge could be revoked for that it would have to be shown that failure to pay was wilful."

In United States Ex Rel. Dessus v. Commonwealth of PA, 452 F.2d 557 (1971), quotes Fay v. Noia, 372 U.S. 391, 83 S.Ct 822, 9 L.E.2d 837 (1963), "The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter." At page 560 of Dessus, supra,

> "thus custody is the passport to federal habeas corpus jurisdiction." "Without custody, there is no detention." "Without detention, or the possibility thereof, there is no federal habeas corpus."

While Illinois Case law is not binding upon this Court, it appears that under Illinois Case law, conditional discharge does not constitute custody. Unless there is a conflict between Illinois and Federal Law, some deference should be given to view of Illinois courts as to if conditional discharge constitutes custody. In People Ex Rel. Williams v. Morris, 44 Ill. App.3d 39, 357 N.E.2d 851 (1976) the Illinois Court disagreed with this court as to parole constituting custody. The Illinois Court took the position that restrictions under parole were not severe enough to constitute custody. The Court noted the case of Jones v. Cunningham, 1983 supra was an interpretation of a federal statute, and although "persuasive authority, is not binding on this court" in regards to application of State habeas corpus statute. If Illinois does

not recognize parole as constituting custody, it would not recognized conditional discharge which is a far less severe sentence than parole as constituting custody. Furthermore the Illinois Supreme Court in dictum in Creek v. Clark, 88 Ill.2d 54, 429 N.E.2d 1199 (1981), in regards to issue if person released on bail is in custody, indicates that without physical custody there is no custody for purpose seeking habeas corpus relief under the State Statute.

In People v. Warr, 54 Il 2d 487, 298 N.E. 2d 164, (1973), in reliance upon the 14th Amendment and due process rights as found by the United States Supreme Court extended coverage of Post-Conviction Hearing Act, 725 ILCS 5/122-1 and 5-122-2, to persons convicted of misdemeanors. At first blush, this might be an indication that Illinois recognizes that a misdemeanor conviction can be severe, but this is only partly correct, as a person convicted of a misdemeanor only has 4 months, from date of conviction to file for Post Judgment Relief. That Warr also held that the person convicted did not have to be in prison.

It was at least in part because of this four month time period limitation that Montgomery County Circuit Court denied petition to have sentence vacated, since same was held to be untimely see App. 26-27.

The Petitioner's Fourth Amendment rights were violated since as stated in the §1983 complaint asserts that after being arrested he was advised by Agent Sheeley that his residence, and the separate residences of his father and adult daughter were searched in regards to the criminal investigation of him, (In referring to residence, Petitioner is not allegedly that the separate homes of his father, his daughters and his was searched, but rather that the farm these homes are on were searched, and that one out building was entered) There has never been a formal acknowledgment of these searches, and without discovery being allowed as part of a §1983 claim, it is not believed there will ever be a formal

acknowledgment, or for that matter a formal denial of these searches.

Petitioner believes the illegal concealed searches are significant especially as Officer Sheeley, and Illinois State Police Office, had no authority to conduct a search in Missouri.

Petitioner in his Second Amended § 1983 Complaint, alleges that Agent Sheeley knew where Petitioner was to be found but did not have him arrested; further the warrant for his arrest was never circulated or placed with NCIC. It is Plaintiff's theory of the case, that Agent Sheeley never wanted Anderson arrested, and when Plaintiff was arrested Sheeley never wanted the facts of the case disclosed in Court. That the States Attorney became part of a conspiracy, when (if not prior) she advised that the guilty plea had to be taken when Agent Sheeley was out of town, as a means of compelling the Petitioner, thru coercion and duress, to accept a guilty plea. Deliberate and wilful failure to effect the arrest of a person by a police officer who knows of a outstanding warrant is a serious breach of duty upon the part of that a Police Officer but Petitioner's Attorney is unable to allege how this would be a violation of his Federal Constitutional rights, unless it is viewed as part of a conspiracy to deprive Petitioner of his due process rights.

Petitioner's Due Process rights under the fifth and fourteenth amendments were violated by being forced by coercion and duress, to plead guilty and to condition of paying restitution for matters that in no way, shape or manner were related to the crime that he was charged with, (The necessity for the existence of a causal relation between the restitution and the criminal conduct for which the Defendant is charged, was recognized in People v. Fontana, 251 Ill. App. 3d 694, 622 N.E.2d 893 (1993). Further the false transcript which transcript which shows he was advised of many of his constitutional rights, when in fact he was advised as to none

of his constitutional rights; (In regards to Montgomery Circuit Court case 93-CF-10 Petitioner never appeared before the sentencing judge).

Petitioner's sixth amendment rights were violated in that it is alleged there is a totally false and fabricated sentencing transcript, which if true and Petitioner is not allowed to prove such, makes a mockery of our Justice system, particularly in that a reading of this false transcript shows he was advised of many, (but not all of his constitutional rights).

Petitioner's eighth amendment rights were violated in that making him pay restitution on loans not causally related in any manner to the crimes charged, is both a violation of due process and is cruel and unusual punishment.

The aforesaid constitutional violations are part of the basis for a Section 1983 cause of action, against the Defendants who were either directly acting under color of state law and/or conspiring with those who were. In Jones v. City of Chicago, 586 F.2d 985, (7th Cir. 1988), at page 992, it is stated, "to be liable as a conspirator you must be a voluntary participant in a common venture, although you need not have agreed on the details of the conspiratorial scheme or even know who the other conspirators are."

Amendments to 28 U.S.C. § 2244(d) limiting the time for filing habeas corpus relief for State Court conviction is inapplicable to the case at bar.

The following cases pertain to 28 U.S.C. §2244(d). In Post v. Gilmore, 117 F.3d 556, (7th Cir. 1997), the court notes at page 557 that "Under the 1996 amendments to 28 U.S.C. § 2244(d), a prisoner has only one year from the date the state appellate process ends to bring a collateral attack; time waiting for the conclusion of a § 1983 action is not among the periods that the statute excludes from the calculation." In

Flower v. Hanks, 941 F.Supp. 765 (N.D.Ind. 1996), held that after the effective date of the aforesaid amendments, April 24, 1996 a person had a one year grace period in which to file, a writ of habeas corpus. Applying this to the Petitioner but for the fact that he was not in custody he could have filed application for a writ of habeas corpus. It is noted that Griffin V. Endicott, 932 F.Supp.231 (E.D.Wis. 1996 came to an opposite conclusion). The holding of the above cases may have been modified by This Court's rational in its recent ruling in Lindh v. Murphy, 117 S.Ct 2059, 138 LE.2d 481, (1997) which considered the retroactive application of a different section of the Habeas Corpus Statute, 28 U.S.C §2254(d) and which held that it (high review standard) does not apply to a pending writ for habeas corpus.

The extent to which 28 U.S.C. § 2244(d) limits the time for filing habeas corpus relief from a State Court conviction is not relevant to this case, since the §1983 complaint and the amended complaint were both filed in February 1996, several month prior to the aforesaid habeas corpus statute being amended by being signed into law on April 24, 1997. In otherwords, since he was never in custody at no time, either before, or after he filed his §1983 complaint and to the extent that 28 U.S.C. 2244(d) places a time limit on bringing a writ for habeas corpus it does not apply to Petitioner, since he was never eligible for the writ.

II. Even if the holding of Heck v. Humphrey applies, in regards to first setting aside the underlying conviction, constitutional injuries of a serious nature not related to the underlying conviction can be asserted, in some jurisdictions:

II. Even if the holding of Heck v. Humphrey, supra applies to Petitioner, there is an exception in some jurisdictions that allows a § 1983 cause of action were the constitutional injuries are not related to the underlying conviction. In the case at bar

The Seventh Circuit allows such an exception providing the constitutional injury is of a serious nature. The Petitioner respectfully disagrees with the Courts below that an illegal search of Petitioner's property, by a Police Office outside of his jurisdiction is not a serious violation.

Petitioner also disagrees with the Court that there was no basis to assert that the transcript was totally false and fabricated. In this regards two things are noted: 1) The District court's attention was never called to the differences in dockets sheets, wherein where the Defendant admittedly appeared before Judge Slater in a civil matter on January 12, 1997 the word appeared with counsel is used and in the criminal matter in which a different patterns of words was used. These Docket Sheets was submitted by Defendant Attorney Kelly D. Long to the District Court, along with a large amount of records from the Montgomery County Circuit Court in cases No. 93-CF-10 and 91-LM-14 below. Kahn did not receive a copy of same, although if he had it's possible that Kahn would have overlook the significance in the wording of these docket sheets.

Petitioner constitutional rights were violated by wilful and deliberate failure to Officer Sheeley to have him arrested when he found where he was, providing this failure was part of a conspiracy.

It is Petitioner's position that the unlawful search, false and fabricate transcript, and wilful and deliberate failure to arrest Petitioner when Officer Sheeley found out where he was providing that this failure was part of a conspiracy, deprived Petitioner of constitutional rights that were in way related to his underlying conviction.

Kahn notes that there is a significant difference in the Circuit in that Schilling v. White, 58 F.3d 1081, 1086, (6th Cir. 1995) cited by the Seventh Circuit notes that it disagrees with the Seventh Circuit that constitutional claims not directly

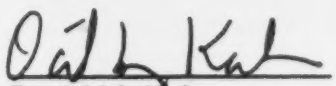
related to an underlying to a conviction can be pursued. Although Petitioner's case was argued in the Seventh Circuit this will not help Petitioner, unless this court finds that constitutional violation in regards to the illegal search were not only substantial, but that there is a factual dispute that cannot be resolved by summary judgment as to if the alleged illegal search was a substantial constitutional violation, that the transcript is false and fabricated, and that wilful and deliberate failure of Officer Sheeley to arrest Anderson was part of a conspiracy.

The difference in Circuits between the 6th Circuit and the 7th Circuit as to if serious constitutional injuries that would not impeach the underlying conviction can be pursued in a §1983 cause of action, is an additional reason for this Court to review the matter so as to resolve a conflict amongst the Circuits.

CONCLUSION

The Petition for a Writ Of Certiorari should be granted.

Respectfully submitted,



David M. Kahn
Counsel of Record
229 S. Main St.
P.O. Box 68
Waterloo, Illinois 62298
Phone #(618) 939-6013

United States Court of Appeals
For the Seventh Circuit

Nos. 96-2524 & 96-2525
BENJAMIN M. ANDERSON,
Plaintiff-Appellant,

and
DAVID M. KAHN,
Appellant,

v.
COUNTY OF MONTGOMERY, State of Illinois, KELEY D. LONG, BOATMEN'S NATIONAL BANK OF CENTRAL ILLINOIS, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 96 C-3031--**Richard Mills**, Judge.

ARGUED JANUARY 22, 1997-DECIDED APRIL 4, 1997

Before CUDAHY, ROVNER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Benjamin Anderson thinks he should not have been convicted of misdemeanor theft. Usually such a contention is aired in a criminal appeal or a habeas corpus petition, but because Anderson long ago finished serving his short jail term, he instead seeks damages under 42 U.S.C. § 1983. This appeal involves the dismissal of Anderson's suit and the sanctions imposed on his attorney, David Kahn, who filed and pursued the case on Anderson's behalf.

The material facts are not really in dispute. Anderson was a resident of Missouri until 1986, when he moved to Florida to avoid being held liable for child support. In Florida he assumed the alias "Buddy Dane Blaylock." In 1987 Anderson moved back to Missouri and stayed there until 1989. He then moved to Illinois and assumed the alias "Terry Lee Cain," again to avoid liability for child support.

While in Illinois, using the phony Cain name, Anderson purchased several vehicles and equipment with financing by defendants Boatmen's National Bank of Central Illinois and Illinois Bank (a/kla Coffeen State Bank and Trust Co.), among others. Anderson put some money down and made a few monthly payments, but he soon stopped paying and left Illinois (or so it seems) with some of the goods. Attorney Kelly D. Long, a defendant here, represented Boatmens' in a lawsuit brought to recover Anderson's debt or repossess some of the encumbered equipment.

In February 1993 an indictment issued in Montgomery County, Illinois, charging Anderson with providing a false name to obtain, by deception, financing and some of the equipment (valued at over $10,000) with the intent to deprive the lender of its interest in the property. The charge, a felony, was followed by the issuance of a warrant for Anderson's arrest. Several months later Anderson was arrested in Missouri. After waiving extradition, he was driven to Illinois by Montgomery County Sheriff James Vazzi and Special Agent Michael Sheeley of the Illinois State Police, two more defendants in this case. Back in Illinois, apparently after stewing in jail for 26 days, Anderson was released from custody after his father posted bail on his behalf.

Attorney (and yes, defendant) Samuel Panos represented Anderson on the theft charge, and Kathryn Dobrinic, another defendant, prosecuted the case for Montgomery County. The parties negotiated what would appear to be a good deal; a plea of guilty to a lesser charge of theft under $300, a misdemeanor in Illinois. On January 12, 1995, Anderson signed a document entitled "Jury Waiver and Plea of Guilty," admitting his guilt on the charge, as well as a document entitled "Judgment and Sentence/Conditional Discharge," which set out the penalty he received 26 days incarceration (fully offset by the 26 days he spent in jail) and 24 months conditional discharge, a fine of $1,000, and restitution totaling $6,930.72 to the two banks. Part of the restitution was satisfied out of the bail money posted by Anderson's father. The state court conviction, to this day, has

not been vacated.

Anderson feels that a guilty plea in the case was coerced by Panos and Dobrinic. He admits he signed the guilty plea document but claims he never appeared before a judge to be informed of his rights. This assertion, though, is drawn into serious question by the existence of a court transcript in which "Benjamin Anderson" (a/kla Blaylock or Cain), represented by Attorney Samuel Panos, is questioned on the record, enters a guilty plea, and receives a sentence. Anderson claims that the transcript was fabricated by Panos, Dobrinic, and a court reporter (he does not allege that the state court judge participated in the false-transcript scheme). Anderson's contention on this point is supported by four affidavits (his, his father's, and two friends'), which say he was outside the courtroom having a cigarette at the time indicated on the transcript, so he could not have been in court.

On February 2, 1996, Attorney Kahn filed this federal lawsuit for Anderson, suing everybody in sight. The rambling, 28 page, first amended complaint alleged constitutional claims under 42 U.S.C. §§ 1983 and 1985 and state law claims for false arrest and imprisonment and redress conduct against Montgomery County; Attorney Dobrinic in her individual and official capacities; Sheriff Vazzi in his individual and official capacities; Boatmen's and its attorney, Long; Illinois Bank; Panos; Sheeley individually; and one other party who, prior to appeal, was dismissed from the case. The amended complaint accused the defendants of participating in a massive conspiracy to coerce his guilty plea and cause him mental anguish, humiliation, and embarrassment.

Anderson was not bashful about seeking damages for the wrongs he says were visited upon him. For his § 1983 claim alone he sought, in his own words, judgment against Defendant, Montgomery County, Illinois, for actual damages in the reasonable sum of One Hundred Fifty Thousand Dollars ($150,000.00), and against Defendant, Montgomery County, Illinois, for punitive damages in the reasonable sum of One Hundred Fifty Thousand Dollars ($150,000.00), and against Defendant, Kathryn Dobrinic, for actual damages in the

reasonable sum of One Million Dollars ($1,000,000.00), and against Defendant, Kathryn Dobrinic, for punitive damages in the reasonable sum of One Million Dollars ($1,000,000.00), and against Defendant, Michael Scheeley, for actual damages in the reasonable sum of One Million Five Hundred Thousand Dollars, (1,500,000.00), and against Defendant, Michael Scheeley, for punitive damages in the reasonable sum of Three Million Dollars ($3,000,000.00), and against Defendant, Kelly D. Long, for actual damages in the reasonable sum of Five Hundred Thousand Dollars ($500,000.00), and against Defendant, Kelly D. Long, for punitive damages in the reasonable sum of Five Hundred Thousand Dollars ($500,000.00), and against Defendant, James Vazzi, for actual damages in the reasonable sum of Twenty Five Thousand Dollars ($25,000.00), and against Defendant, James Vazzi, for punitive damages in the reasonable sum of Twenty Five Thousand Dollars ($25,000.00), and against Defendant, Case Credit, a Division of J. I. Case, a Tenneco Company, for actual damages in the reasonable sum of One Million Dollars ($1,000,000.00), and against Defendant, Case Credit, a Division of J. I. Case, a Tenneco Company, for punitive damages in the reasonable sum of Two Million Dollars ($2,000,000.00)....

These rather shameless requests, totaling $10,850,000, were then joined with other demands all painfully laid out as to each defendant on other causes of action. The grand total Anderson sought was more than a half a billion dollars.

Although not included in the actual recitation of claims, interpreting the amended complaint in Anderson's favor, various factual assertions additionally accuse someone in Missouri of denying him a right to counsel before being extradited, Sheeley of conducting an illegal search of Anderson's residence, and Sheeley and Vazzi of recklessly endangering Anderson's life by driving 95 miles an hour in a squad car while transporting him from Missouri to Illinois after he waived extradition.

The defendants moved for dismissal or summary

judgment. Attorney Kahn requested and was given numerous extensions (at least 10, it appears) of time to reply to the motions, several because of an injury he apparently suffered in March 1996. Eventually Kahn's responses filtered into the court over a one-week period. In his May 13, 1996, responses to some of the motions to dismiss, Anderson, via Kahn, first raised the idea that Anderson never appeared before a judge for sentencing and that the transcript indicating that he did so was a fake, as well as an assertion that Sheeley and Dobrinic misled the grand jury in securing the original indictment. At this point, Kahn still insisted there were valid claims under § 1985, even though he "reluctantly admit[ted] that the cases cited by the Defendant's [sic] do support [the] proposition" that such claims failed because there was no racial or class-based discrimination against Anderson, who is a white male. The next day, after apparently doing some research, Kahn realized he had to abandon claims against some of the defendants. On May 14 he filed motions to dismiss Montgomery County and Long completely, as well as Dobrinic and Vazzi in their official capacities.

Shortly after Kahn's flings the district court granted the defendants' motions to dismiss (properly treated as summary judgment motions) and for summary judgment. Several parties then moved for Rule 11 sanctions against Attorney Kahn. After a hearing, the district court ordered Kahn to pay $9,681.95 in sanctions to various defendants. Anderson appeals from the grant of summary judgment and Kahn opposes the sanction order. On appeal, Anderson admits that his § 1985 claim was unwarranted and he does not dispute the dismissal of his § 1983 claims against Montgomery County, Long, Dobrinic (official capacity only), and Vazzi (official capacity only). He does, however, challenge the dismissal of some § 1983 claims and whatever state law claims can be gleaned from his factual allegations.

Most of Anderson's § 1983 claims evaporate under Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994). Heck holds that when a § 1983 claim requires a finding that

a criminal conviction (or sentence) was invalidly obtained, no cause of action lies unless the conviction (or sentence) that would be impugned has already been "reversed on direct appeal, expunged by executive order, invalidated by a state tribunal authorized to make such a determination, or called into question by a federal court's grant of a writ of habeas corpus." 512 U.S. at , 114 S. Ct. at 2372. And as we recently noted, the injury alleged not the relief sought determines whether a claim implicates the validity of a sentence or conviction. Heck, 512 U.S. at ____, 114 S. Ct. at 2369-70; Ryan v. DuPage County Jury Comm'n, 105 F.3d 329, 331 (7th Cir. 1996). Anderson now does not dispute that most of his § 1983 claims challenge the legality of his conviction that the prosecutor and his attorney coerced his guilty plea and conspired with the court reporter to obtain his conviction and take his bond money by fencing hearing. If he were to win on these monetary claims, a court would have to hold that a conspiracy deprived him of his rights, in violation of the Constitution, and that his conviction should not have occurred. Because Anderson's state court conviction sat undisturbed when this suit was filed, Heck closes the door, or so it seems, on the claims. But Anderson says Heck applies only to cases where habeas corpus relief is available. Because he was not incarcerated when he brought his § 1983 claims and thus had no habeas corpus relief available to him (he ignores, we note, the strong possibility that his "conditional discharge" status made him eligible for habeas relief, see e.g., Jones v. Cunningham, 371 U.S. 236 (1963)), he says Heck does not completely bar his claims. On a blank slate, or if someone could safely rely on one of the concurring opinions in Heck, this could be a plausible argument. Four Justices, in the concurrence written by Justice Souter, gave some support to Anderson's position. But a concurrence is not the law, and the majority specifically rejected the notion Anderson proffers:

> Justice SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon

> that principle in those cases . . . involving former state prisoners who, because they are no longer in custody, cannot bring post-conviction challenges.... We think the principle barring collateral attacks a longstanding and deeply rooted feature of both the common law and our own jurisprudence is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.

512 U.S. at n.10, 114 S. Ct. at 2374 n.10. Heck, therefore, dooms Anderson's argument on this point. Furthermore, even if the statement we quote from Heck is dicta, the Sixth Circuit recently noted that because Heck relied upon the common law of tort liability, where proof of the illegality of a conviction is a necessary element of certain § 1983 claims, rather than on the need to preserve habeas corpus as the exclusive federal remedy, "Heck applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated." Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995). We agree with the Sixth Circuit's holding in Schilling. The fact that a plaintiff is no longer incarcerated has no bearing on the applicability of Heck. And because Anderson admits that his state court conviction has not been reversed, expunged, invalidated, or otherwise impugned, he has failed to state a § 1983 claim regarding anything involving a challenge to his conviction. That it may be difficult (perhaps in some cases mostly due to a lapse of time) even impossible) to get a conviction reversed or expunged does not constitute a reason for bypassing the holding in Heck. Ryan, 105 F.3d at 331.

Not all constitutional injuries alleged by Anderson, however, would impeach the validity of his conviction. See Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995) (illegal search and arrest claims are not barred by Heck), cert. denied, 117 S. Ct. 104 (1996). But even reading the amended complaint in Anderson's favor, any remaining § 1983 claims that do not depend on invalidating his prior conviction are meritless. For instance, in the amended complaint Anderson claimed he was falsely arrested as a "fugitive from justice." State court records

attached to some of the defendants' motions to dismiss indicate that a warrant for Anderson's arrest issued on February 4, 1993, in connection with the state indictment for felony theft. Anderson was not apprehended until February 1, 1994, so he was indeed a fugitive from justice, as that term is commonly understood, for almost a year. Anderson asserted no other basis to challenge his arrest, so summary judgment against him on this point was properly ordered.

Anderson also argues that Sheeley lied to the grand jury, but the transcript pages presented to the district court defeat Anderson's claim. Anderson claims Sheeley lied (1) because Sheeley told the grand jury Anderson "as I recall, made two monthly payments of the piece of equipment and that was it," while an affidavit from an employee of the lender indicates Anderson actually made a down payment and 6 to 8 monthly payments, and the lender never instructed Sheeley to pursue criminal action, yet theft of its equipment was the charge brought against Anderson. The first point is silly -- Sheeley qualified the statement with "as I recall," and whether Anderson made two or six payments doesn't matter because he failed to pay the full amount due and the lender's interest in the encumbered property was therefore jeopardized by his actions. The second point is sillier -- regardless of whether the lender wanted criminal charges pressed, a prosecutor -- not a victim -- decides to pursue cases in criminal court. See People v. Travis, 94 Ill. App. 3d 983, 992 (1981) (when a prosecutor has probable cause to believe that the accused committed an offense defined by Illinois statute, it is within the prosecutor's discretion whether or not to prosecute); see also Davis v. Owens, 973 F.2d 574, 577 (7th Cir. 1992) (in Illinois, prosecutor, not police officer, decides whether to charge a suspect with a crime).

Similarly, reading the complaint in his favor, some of the facts could be construed as a claim for an illegal search when Officer Sheeley walked around Anderson's property. But Anderson failed to claim or indicate how any such search harmed him or whether it was in fact a "search." He did not allege that Sheeley did any damage by walking around or that

anything was seized. On appeal Anderson concedes he alleged no compensable injury but argues that this claim should not have been dismissed because full discovery would have enabled him to ascertain the extent of the search and find compensable injury to assert. A federal lawsuit, however, is not a fishing expedition. Anderson was out of jail for almost a year when he filed this case; if by then he knew neither the extent of the search nor how he was harmed by it, he can't complain when this claim, on this record, was put to rest by the district court.

Finally, Anderson argues that the district court should have allowed him to file a second amended complaint to correct any deficiencies. Kahn brought up the motion to amend at the district court's June 4, 1996, hearing on sanctions, and the motion was denied. The district court found that in light of Heck, everything Kahn wanted to file made no difference in the case. Anderson now contends that the amendment should have been allowed because Kahn was in a wheelchair (temporarily) which made it difficult for him to file the amended pleadings any earlier. He also says the information regarding the "false transcript" and Officer Sheeley's supposed lies to the grand jury were "new evidence" to him.

In considering this claim, we think the district court was generous in regard to Kahn's ailments. Kahn was granted 10 extensions of time to prepare responses to the motions to dismiss. He finally filed some of his responses with the court 3 days after the last extended due date, and other responses filtered in over the next week. The exhibits he referenced in most of his responses were filed even later. The district court nevertheless tolerated Kahn's delinquencies (Kahn apparently thought postmarking a brief by the required date was equivalent to filing it) and took Kahn's materials into consideration. As to the "new evidence," the statement by Anderson that he did not attend a sentencing hearing and the contents of Sheeley's grand jury testimony were available long before June 1996 and, as the district court correctly pointed out, make no difference regarding dismissal of the

case.

The federal claims were properly disposed in this case, and the district court's decision not to exercise jurisdiction over any state-law claims cannot be deemed incorrect on this record, which brings us to Kahn's appeal.

The district judge imposed sanctions under Federal Rule of Civil Procedure 11 because he felt Kahn failed to perform a reasonable inquiry before filing the case and, once the case got going, persisted in pursuing frivolous claims. We review this grant of sanctions for an abuse of discretion. Johnson v. A.W. Chesterton Co., 18 F.3d 1362, 1364 (7th Cir. 1994).

Fed. R. Civ. P. II(b) states that by presenting a pleading to a court, an attorney certifies

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (2) the claims . . . are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [or]
>
> (3) the allegations and other factual contentions have evidentiary support ....

The district court believed sanctions were justified here for several reasons, including the fact that Kahn failed to consider the impact of Heck on most of the claims. Our review of the record confirms the view of the district court; Kahn didn't consider Heck or its sound principles before this suit was filed.

In addition, even if Kahn had a non-frivolous argument regarding the application of Heck, the allegation of what actually amounted to criminal wrongdoing on the part of the Montgomery County attorney, a defense attorney, and later a court reporter for fabricating a sentencing hearing transcript is such an extremely serious charge that it required a serious investigation by Kahn before he acted. Judges often see unrepresented prisoners claim that everyone connected with their cases including court officers participated

in grandiose conspiracies to violate their rights and secure their convictions illegally. It is a rare of this sort, which impugn the honesty of court officers. The required level of investigation into the facts before making an accusation depends, of course, on the circumstances of the case. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989). In this case it was incumbent upon Kahn to look into the false-transcript accusation with a lot more care than he used. Obtaining affidavits from his client a man who admits to skipping town to avoid child support, assuming aliases and obtaining credit under false names, and failing to pay off his creditors -- and his client's father and friends was not sufficient. Kahn could have checked with, among others, the state court judge's staff (if not the judge himself), and he could and should have carefully reviewed the state court records before he filed this claim. To have made such a serious accusation and then say more time is needed for real discovery on the matter is not acceptable.

Certain allegations in the amended complaint indicate that Kahn was unfamiliar with applicable federal law and procedures. For instance, in various documents filed in district court Kahn contended that the original indictment was for felony theft, yet Anderson pleaded guilty to misdemeanor theft, as if this had significance. But it has no significance because defendants routinely plead guilty to lesser charges, and that doesn't mean that something sinister has occurred. When an attorney takes a case in an area of law about which he is a little uncertain, he should get educated quickly or, better yet, pass the case to a different attorney. Courts and opposing parties not to mention clients deserve nothing less.

Actually, as we closely consider Kahn's present position, he seems to agree that sanctions were not inappropriate as he focuses most of his fire on their form and amount. He even suggests that instead of a monetary penalty we consider alternative sanctions such as reporting him to the Illinois Bar or curtailing his access to federal courts.

Rule 11 indicates that courts may order a sanctioned

party to pay the prevailing party its reasonable expenses and attorney fees incurred as a direct result of the violation, if an order to that effect is warranted for effective deterrence. Fed. R. Civ. P. 11(c)(1)(A) and (c)(2). That's what the district court did here, reviewing affidavits from the defendants as to the amount they spent defending the meritless amended complaint (and filing for sanctions), finding the amounts reasonable, and ordering Kahn to pay the total as a deterrent to filing future frivolous lawsuits.

But the defendants are not automatically entitled to receive full reimbursement of their expenses just because the case was frivolous. A Rule 11 sanction is not meant to reimburse opposing parties for their costs of defense. The purpose of the rule is to deter baseless filings, John son, 18 F.3d at 1365, and the sanction "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated," Fed. R. Civ. P. 11(c)(2). When imposing sanctions, a court should take ability to pay into account. Johnson, 18 F.3d at 1366. And the least severe sanction that is adequate to serve the purpose of the rule should be imposed. Id. To a sole practitioner with a practice that is not lucrative, a fine of $500 may be painful enough to make the desired impact. To a big law firm, a much larger sum may not be a deterrent. The burden is on the sanctioned party, though, to show he cannot pay a reasonable sanction. Id.

Kahn offers several reasons why he should not be fined or why the fine should be reduced: as a mitigating factor, he filed a motion to dismiss the improperly named parties and finally did admit that the § 1985 claim had no merit; he suffered a leg injury "and therefore was unable to go to the law library to do the necessary research" (he does not have Westlaw or Lexis access, either); and finally, he has a negative net worth and is in dire financial circumstances, struggling to meet basic office bills.

Kahn, though, also gives us several good reasons for not disturbing the sanctions order. First, when presented with the defendants' affidavits setting out their costs and

fees, Kahn said they were reasonable:

THE COURT: So I assume if I'm understanding what you're saying, is that in general you do not question the various amounts that have been set down?

MR. KAHN: No, that's fair and reasonable. The amounts

THE COURT: As to all of those fees?

MR. KAHN: Yes, sir.

THE COURT: As to all of the defendants?

MR. KAHN: Yes, sir.

Second, Kahn dragged not one but eight defendants into the case, a suit with no legal or evidentiary merit. Then, after losing the case and being sanctioned for bringing it, he appealed, dragging the defendants into more work, costs, and attorney fees.

Third, although Kahn's briefs before us indicate his promise to stick to "bread and butter" cases during oral argument that he already has begun to drift back into more complex matters. Finally, Kahn could have pointed to his financial condition at the sanction hearing but he chose not to do so. At the hearing he said:

> There are several cases in Miller and Wright where it says that if you raise the defense of or the question of inability to pay, and document it, that should not only go into not as to when you pay, but if you pay. Because these cases explain it's not the intention of the code to bankrupt an attorney.
>
> And I purposely did not bring that to the Court's attention because the truth of the matter is I sought big bucks against these people, I sought punitive damages. And for me to be a wimp and say, oh my God, I can't pay it, that's not right. But so you don't jam me for contempt of court, and I realize I have to provide detailed financial statements; I have negative net worth. But if it is the last thing I ever do, I will pay these people off. If it's not reversed on appeal, I swear to God I will pay them off, because some things are

just not morally right.

A couple weeks later Kahn moved for an order staying execution of the judgment during the appeal. Kahn included an affidavit indicating how few assets he had, but then, in his memorandum, he said:

> Since that time, I recommended to my client that he appeal the order for summary judgment, and since the purpose of sanctions is to deter, and same has not deterred Kahn in pursuing this matter, in regards to most of the defendants, this is an additional reason why I am not arguing that inability to pay should not be considered as a circumstance.

From the context of this statement, the double negative should be ignored. Apparently, Kahn was looking for permission to defer payment or for the court to set up a payment plan, rather than obtaining a reduction in the amount of the award.

Kahn basically asks us to hold that the district court abused its discretion when it took him at his word regarding his promise to pay and the reasonableness of the defendants' fees. We will not do so – and could not do so without diminishing our fundamental requirement that attorney representations to a court be truthful. It is not up to us to protect attorneys from promises they later don't think they can keep. Because Kahn failed to effectively bring up his financial circumstances, and in fact expressly indicated he was not relying on that subject, any argument for reduction in the size of the sanction due to dire straits is waived. The judgment of the district court is therefore

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

BENJAMIN M. ANDERSON,	)	
	)	
vs	)	Case No. 96-3031
MONTGOMERY COUNTY,	)	
ILLINOIS, et al.	)	
Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Defendants', except Case Credit, Motions to Dismiss, Strike, and for Summary Judgment.

I. BACKGROUND

Benjamin Anderson has filed a 28-page First Amended Complaint against a total of nine defendants: Montgomery County, the Montgomery County States' Attorney, the Montgomery County Sheriff, a state police officer, a criminal defense attorney, three financial institutions, and one employee of a financial institution.

Anderson alleges three counts. In Count I, pursuant to 42 U.S.C. § 1983 & 1985, he maintains he was unconstitutionally arrested and prosecuted. In Count II, he claims he was falsely arrested and imprisoned in violation of 42 U.S.C. § 1983 & 1985. Lastly, in Count III, he claims "Prosecutorial Misconduct" in violation of 42 U.S.C. §§ 1983 & 1985. Additionally, in a section labeled "Nature of Action", Anderson asserts that he is making claims for conspiracy, "numerous violations", and other state and federal law claims.[1]

All Defendants, except Case Credit which has not answered or otherwise filed a pleading, move to dismiss, strike, or for summary judgment. In their various motions,

Defendants assert a number of different reasons why this action should be dismissed. Additionally, most of the Defendants also seek sanctions pursuant to Fed. R. Civ. P. 11.[2]

II. FACTS

The gist of the First Amended Complaint is that Anderson, also known as Buddy Dane Blaylock and Terry Lee Cain, was arrested in Franklin County, Missouri on February 1, 1994. According to the First Amended Complaint, he was arrested pursuant to a warrant entitled "Fugitive From Justice". Anderson, however, claims that the arrest warrant did not actually exist. Regardless, Anderson eventually consented to be extradited--although he maintains that doing so violated his Sixth Amendment rights.

On February 7, 1994, Defendants Vazzi and Sheeley, acting in their official capacities of sheriff and state police officer, went to Missouri and transported Anderson to Montgomery County. According to the First Amended Complaint, on February 14, 1994, Anderson's father posted $50,000 bail to get Anderson out of jail. Thereafter, according to First Amended Complaint, Anderson pleaded guilty to Theft. He, however, contends that he was coerced into changing his plea from not guilty.

---

[1] Plaintiff's Complaint is confusing, rambling, and disorganized.

[2] The Court will address the motions for sanctions in a separate order changing his plea from not guilty.

Anderson also maintains that the Montgomery County States, Attorney improperly gave information to his creditors and that after he pleaded guilty, his bond was improperly given to his creditors instead of being returned to his father. Anderson also makes claims of a general conspiracy.

III. ANALYSIS

A. Legal Standard

In ruling on a motion to dismiss, the Court "must

accept well pleaded allegations of the complaint as true. In addition, the Court must view these allegations in the light most favorable to the plaintiff." Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1039 (7th Cir. 1987). Although a complaint is not required to contain a detailed outline of the claim's basis, it nevertheless "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Car Carriers Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985). Mere conclusions, without supporting factual allegations, are insufficient to support a claim for relief. Cohen v. Illinois Institute of Technology, 581 F.2d 658, 663 (7th Cir. 1978), cert. denied, 439 U.S. 1 135 (1979). Dismissal is not granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957).

B. Matters Outside The Pleading

Because the Court will consider matters outside the pleadings, specifically the Information, Indictment, and Judgment in Montgomery County Case No. 93-CF-10, the Court will treat the pending motions pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ.P. 12(b).

C. Claims Conceded

Plaintiff concedes that he has basis to sue Defendants Long and Montgomery County. He also admits that there are no grounds to sue Defendants Vazzi and Dobrinic in their official capacities.[3] Accordingly, the motions to dismiss filed by Defendants Long and Montgomery County are allowed and the claims against Defendants Vazzi and Dobrinic in their official capacities are stricken.

D. 42 U.S.C. § 1983

Plaintiff contends that he was falsely arrested for being a fugitive from justice. The record in Case No. 93-CF-10, however, shows that an arrest warrant was issued for Anderson on February 4, 1993. Thus, for almost one year--February 4, 1993 until February 1, 1994--Anderson was a fugitive from justice. Thus, there is no basis for Anderson's

claim that the warrant was improper. Moreover, for purposes of a civil action, it is not relevant whether Montgomery County authorities knew where Anderson was located when the warrant was issued.

Anderson also claims that § 1983 was violated because he was coerced into pleading guilty. However, in Heck v. Humphrey, 114 S.Ct. 2364 (1994), the United States

---

[3] As previously stated, possible sanctions will be discussed in a separate order.

Supreme Court stated:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or other harm caused by actions whose unlawfulness would render a conviction, or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 2372.

Anderson has not demonstrated that his theft conviction has been reversed or otherwise challenged.[4] Accordingly, he does not have a cognizable claim under § 1983.

E. 42 U.S.C. § 1985

Anderson does not specify which subsection of 42 U.S.C. § 1985 he is relying upon. Moreover, construed broadly, Anderson asserts that there are two conspiracies--one between the prosecutor and the financial institutions and one between the prosecutor and his former defense attorney. Therefore, both the second clause of §

1985 (2) and first clause of 1985 (3) may be applicable.

Regardless, as noted by the Defendants, to state a claim under either the second clause of § 1985 (2) or the first clause of § 1985 (3), a plaintiff must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. . . ." Griffin v. Breckenridge, 403 U.S. 88,102 n.9 (1971).

---

[4] Anderson has filed a document that shows he filed a motion for post-conviction relief pursuant to 725 ILCS 5/122-1 on May 16, 1996. Heck, however, clearly requires that the conviction be invalidated before a § 1983 action can be maintained. Id. at 2372.

See Kush v. Rutledge, 460 U.S. 719, 725 (1983) (noting that the second clause of § 1985 (2) requires an intent to deprive a victim of equal protection). In this case, Anderson does not allege that he was discriminated against because of his race or any other category.

F. State Law Claims

Although it is far from clear because they are not set forth in separate paragraphs, construed liberally Anderson might be attempting to assert state law claims for false arrest and malicious prosecution. If so, the Court refuses to exercise supplemental jurisdiction. See 28 U.S.C. § 1367 (c) (3).

Ergo, because Plaintiff has failed to state a federal claim for which relief can be granted, Defendants' motions (d/e 13, 25, 30, 36, 43. 50) are ALLOWED. All other motions, except those seeking sanctions, are MOOT. Because matters outside the pleadings were considered and the motions to dismiss were treated pursuant to Fed. R. Civ. P. 56, summary judgment is entered on behalf of all Defendants on all federal claims. The Court declines jurisdiction over the state law claims. All parties will bear their own costs.[5]

SO ORDERED.

CASE CLOSED.

ENTER: 21 May, 1996

FOR THE COURT:

RICHARD MILLS
UNITED STATES DISTRICT JUDGE

---

[5] The Court reserves ruling on the issue of sanctions.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

BENJAMIN M. ANDERSON	)	
Plaintiff,	)	
	)	Case No. 96-3031
vs.	)	
MONTGOMERY COUNTY,	)	
ILLINOIS, et al.	)	
Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion to reconsider.

On May 22, 1996, this Court entered summary judgment against Plaintiff.[1] On reconsideration, Plaintiff asks to be allowed to file a second amended complaint.

The Court will not modify the May 22, 1996 judgment. The Court finds that this suit is foreclosed by Heck v. Humphrey, 114 S.Ct. 2364 (1994). Specifically, before Plaintiff has a cognizable § 1983 claim, his state court conviction or sentence must be invalidated. Id. at 2372.

In this situation, Heck is applicable because the gist of Plaintiff's claim is that there was a conspiracy to falsely convict him and a conspiracy to take his bond money. Thus, there is a direct relationship between the state conviction and the § 1983 allegations. Id. Moreover, construed most favorably to Plaintiff, in the one allegation not directly related to the state conviction that could possibly state a claim

---

[1] The motions to dismiss were treated pursuant to Fed. R. Civ. P. 56 because matters outside the pleadings were considered.

--the alleged illegal serch--Plaintiff does not allege an actual compensable injury. 114 S.Ct. 2372 n.7.

In a related matter, the Court does not find that the case Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995) mandates that the Court stay rather than enter summary judgment. In Simpson, the Plaintiff's criminal conviction was on direct appeal when district court applied the Younger doctrine, and the civil case was filed before the criminal conviction.

In this case, Plaintiff did not even bother to challenge his state court conviction until motions to dismiss were pending in this case. Additionally, Plaintiff had ample time to file for post-conviction relief before the statute of limitations would bar a § 1983 action. Moreover, in the very unlikely event that Plaintiff does get his state court conviction reversed, he can seek relief pursuant to Fed. R. Civ. P. 60(b) in this Court.

The final reason why the Court refuses to reconsider the imposition of summary judgment is because this case is frivolous. As explained in this Court's order imposing sanctions, the evidence is clear that Plaintiff was present when he was sentenced in state court. Thus, prolonging this litigation is not in the best interests of justice.

Ergo, Plaintiff's motion for reconsideration is DENIED. All other motions are MOOT.

SO ORDERED.
CASE CLOSED.
ENTER: 6 JUNE, 1996
FOR THE COURT:
RICHARD MILLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

BENJAMIN M. ANDERSON, Plaintiff,	)	
vs	)	Case No. 96-3031
MONTGOMERY COUNTY, ILLINOIS, et al. Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Plaintiff's motion for the Court to re-examine a portion of its findings.

On June 6, 1996, the Court entered an order against Plaintiff's counsel for violating Fed. R. Civ. P. 11. Plaintiff's counsel now moves pursuant to Fed. R. Civ. P. 60(b)(6) to have the Court amend the June 6, 1996 Order.

Specifically, although Plaintiff's counsel notes that it will not affect the finality of the judgment, Plaintiff's counsel requests the Court to amend its finding that Plaintiff's counsel was accusing an Illinois Circuit Court Judge of participating in a conspiracy.

Although the Court has doubts about whether this motion is governed by Fed. R. Civ. P. 60(b)(6), the Court will correct that record to the extent that Plaintiff's counsel did not implicitly assert that an Illinois Circuit Court Judge was part of the conspiracy. Plaintiff's counsel is correct that it is theoretically possible that the transcript of the Plaintiff's sentencing hearing, in which the Illinois Circuit Court Judge extensively questioned Plaintiff, was fabricated without the knowledge of the Illinois Circuit Court Judge.

Nevertheless, the Court stands by the underlying point that Plaintiff's counsel was making very serious and suspect allegations against the Montgomery County State's Attorney, a well regarded criminal defense attorney, a court reporter,

and others. Accordingly, he had a duty to carefully investigate the facts before filing suit.

Ergo, as it does not affect that judgment, Plaintiff's motion (d/e 101) is DENIED. The Clerk of the Court, however, shall ensure that this Order gets sent to the United States Court of Appeals for the Seventh Circuit with the rest of the record.

ENTER: 26 JUNE, 1996
FOR THE COURT:
RICHARD MILLS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 23, 1997

Before

Hon. TERENCE T. EVANS, Circuit Judge

BENJAMIN M. ANDERSON, Plaintiff and DAVID M. KAHN, Appellants, v.	] Appeals from the United States District Court for the Central District of Illinois, Springfield Division.
Nos. 96-2524 and 96-2525	] No. 96 C 3031
COUNTY OF MONTGOMERY, State of Illinois, KELLY D. LONG, BOATMEN'S NATIONAL BANK OF CENTRAL ILLINOIS, Defendants-Appellees,	] Richard Mills, Judge.

Upon consideration of **MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE PETITION FOR REHEARING IN BANC**, filed on April 21, 1997, by Attorney David M. Kahn,

IT IS ORDERED that the motion is **DENIED** as untimely.

APP. 26

ADDITIONAL RECORD SHEET

Case No. 93CF10

Nature of Case
Benjamin M Anderson aka Terry L Cain aka Buddy Blaylock

DATE	JUDGE and REPORTER	COST
8-19-96	M. Joy	Defendant was convicted of misdemeanor theft pursuant to a negotiated plea on January 12. 1995. He filed a Petition and Motion to Set aside Judgment, Sentence and Fine on May 16, 1996. The State moved to dismiss the Petition on May 21, 1996. Although the Petition itself does not make it clear, Defendant/Petitioner at oral arguments on the Motion to Dismiss stated that it is brought pursuant to the Post Conviction Act. The Act is applicable to those who are imprisoned in the penitentiary (and has been extended by case law to those on parole or mandated supervised release), a situation not applicable here. However, People v. Warr. 54 Ill. 2d 487 (1973). provided that a misdemeanor defendant may institute a proceeding "in the nature of" a post-conviction must be filed within four months of the conviction, a situation also not present here. The court is unable to find any subsequent case which alter this ruling. People v. Cangelosi, 68 Ill.App.3d 489 (1979), did extent the four month period, but in that case the constitutional claim did not exist until after rendition of the judgment. The Court is granting the Motion to dismiss for the" reasons stated therein. In addition, the court notes that

the Petition is not clear and concise, but is confusing and contains numerous conclusions. Defendant is granted 28 days to replead under the following conditions. The authority for the relief sought, whether the Post Conviction Act, Section 2-144 1, or something else should be stated. If the Defendant is alleging the judgement to be void from its inception for the Defendant's alleged nonappearance before the judge at the time of his plea, this should be plead in a separate count. If a petition in the nature of a post-conviction petition is brought, Petitioner should allege facts which show that the claim is timely made. Clerk to notify counsel.

ADDITIONAL RECORD SHEET

Case No 93CF10

Nature of Case
BENJAMIN ANDERSON A/K/A TERRY L. CAIN AKA BUDDY BAYLOCK

DATE	JUDGE and REPORTER	COSTS
2-26-97	Huber	Having reviewed the pleadings filed herein, the arguments of counsel and the memorandum of law, the court finds the position of the state is correct as stated in the motion to dismiss. The motion to vacate judgment, sentence and fine is dismissed. Clerk to notify counsel of entry.

ADDITIONAL RECORD SHEET

Case No 93CF10

Nature of Case
BENJAMIN ANDERSON AKA TERRY L CAIN AKA BUDDY BAYLOCK

DATE	JUDGE and REPORTER	COSTS
6-10-97	Huber	Having reviewed the exhibits and having considered the arguments of counsel, the court finds no reason to modify its order of 2-26-97. The motion to reconsidered is denied.

OPPOSITION

BRIEF

No. 97-422

Supreme Court, U.S.
FILED
OCT 2 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

BENJAMIN M. ANDERSON,

Petitioner,

v.

KELLY D. LONG; NATIONS BANK, f/k/a Boatmen's National Bank of Central Illinois; ILLINI BANK, f/k/a Coffeen State Bank & Trust Company; SAMUEL W. PANOS; KATHRYN DOBRINIC, State's Attorney of the County of Montgomery, Illinois; MICHAEL SHEELEY, Special Agent, Illinois State Police; JAMES VAZZI, Sheriff of the County of Montgomery, Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

JAMES C. COOK*
WALKER AND WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62226
(618) 277-1000
Counsel for Respondents Dobrinic and Vazzi

KELLY D. LONG
KELLY LONG LAW OFFICE
P. O. Box 216
Hillsboro, Illinois 62049
(217) 532-6632
Counsel for Respondent Long

KAREN KENDALL
CRAIG L. UNRATH
HEYL, ROYSTER, VOELKER & ALLEN
600 Bank One Building
Peoria, Illinois 61602
(309) 676-0400
Counsel for Respondents Panos and Illini Bank

*Counsel of Record

PATRICK J. LONDRIGAN
HEYL, ROYSTER, VOELKER & ALLEN
Suite 575
First of America Center
P. O. Box 1687
Springfield, Illinois 62705
(217) 522-8822
Counsel for Respondents Panos and Illini Bank

JON GRAY NOLL
NOLL LAW OFFICE
509 West Capitol
Springfield, Illinois 62704
(217) 544-8441
Counsel for Respondent Illini Bank

D. BRADLEY BLODGETT
HINSHAW & CULBERTSON
400 South Ninth Street
Springfield, Illinois 62701
(217) 528-7375
Counsel for Respondent Nations Bank

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person who pleads guilty to a misdemeanor and is placed on conditional discharge is deemed in custody for purposes of being able to apply for writ of habeas corpus.

2. Whether *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), requires that a person who pleads guilty to a misdemeanor and is not held in custody is required to have his conviction vacated before pursuing a claim under 42 U.S.C. § 1983.

3. Whether *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars a suit under 42 U.S.C. § 1983 which, allegedly, does not impeach the validity of the plaintiff's conviction which has not been vacated.

LIST OF PARTIES TO PROCEEDING IN COURT OF APPEALS

The caption of the case in this Court contains the names of all parties.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Illini Corporation is the parent of Illini Bank which was formerly known as Coffeen State Bank & Trust Company.

Nations Bank is a national bank which was formerly known as Boatmen's National Bank of Central Illinois which was a wholly-owned subsidiary of Boatmen's Bancshares, Inc.

The petitioner, Benjamin M. Anderson, and respondents, Kelly D. Long, Samuel W. Panos, Kathryn Dobrinic, State's Attorney for the County of Montgomery, Illinois, Michael Sheeley, Special Agent for the Illinois State Police, and James Vazzi, Sheriff of the County of Montgomery, Illinois, are sued in their individual capacities and do not have parent or subsidiary companies.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties to Proceeding In Court of Appeals .. ii

List of Parent Companies and Non-Wholly Owned Subsidiaries iii

Table of Contents..... iv

Table of Cited Authorities v

Opinions Below 1

Jurisdiction..... 1

Corrected Statement of the Case..... 2

Reasons Why the Petition Should Be Denied..... 6

I. Neither the decision below nor the record raise the Questions Presented in the petition 6

II. Petitioner's claim is barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) 13

Conclusion 16

TABLE OF AUTHORITIES

Page

Anderson v. County of Montgomery, 111 F.3d 494 (7th Cir. 1997) 1, 5, 6, 8

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) ..... *passim*

Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) 9, 11

Ryan v. DuPage County Jury Comm'n, 105 F.3d 329 (7th Cir. 1996) 9

Schilling v. White, 58 F.3d 1081 (6th Cir. 1995) 9

STATUTES:

§1 of the Civil Rights Act of 1871 (42 U.S.C. §1983) 2, 8, 14

Fed.R.Civ.P. 11 ..... 5, 14, 15

RESPONDENTS' JOINT BRIEF IN OPPOSITION

The respondents, Kelly D. Long; Nations Bank; Illini Bank; Samuel W. Panos; Kathryn Dobrinic, State's Attorney of the County of Montgomery, Illinois; and James Vazzi, Sheriff of County of Montgomery, Illinois, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Anderson v. County of Montgomery*, 111 F.3d 494 (7th Cir. 1997).

The orders and judgment of the district court are not reported, but are appended to the petition for writ of certiorari at App. 15-24.

JURISDICTION

This Court has jurisdiction to review by writ of certiorari the April 4, 1997, judgment of the Court of Appeals. (28 U.S.C. §1254(1).) Following entry of the Court of Appeals' judgment, plaintiff filed a "motion for enlargement of time in which to file petition for rehearing en banc" which was denied by the Court of Appeals as untimely on April 23, 1997. On July 7, 1997, Petitioner attempted to file a petition for writ of certiorari in this Court which was rejected by the Clerk of this Court on

July 11, 1997. The Clerk notified petitioner he would be given sixty additional days pursuant to Supreme Court Rule 14.5 to submit a corrected petition. The corrected petition was filed September 9, 1997.

CORRECTED STATEMENT OF THE CASE

I. Summary of Proceedings.

The state court criminal conviction of which petitioner complains was entered January 12, 1995, when Illinois Circuit Judge David Slater accepted plaintiff's guilty plea to one count of misdemeanor theft (reduced from felony theft) and imposed sentence. In open court at that time, plaintiff signed a certificate of receipt acknowledging receipt of a true copy of the judgment and sentence imposed that date by the court. (R.Doc. 70, Plaintiff's Exhibit A, p. 5) Petitioner also filed with the District Court in this case a transcript of the January 12, 1995, sentencing hearing. (R.Doc. 75, Plaintiff's Exhibit D)

Prior to filing his civil rights complaint under 42 U.S.C. §1983, plaintiff did not challenge or attempt to vacate his guilty plea and conviction for misdemeanor theft. (Petition at 5)

Though the petition in this Court describes plaintiff's subsequent efforts to vacate the guilty plea and conviction after the District Court entered final judgment, those state court proceedings are not contained in the record on appeal.

II. Summary of Facts.

Plaintiff was prosecuted in an Illinois state court for theft. (*People v. Anderson* (Fourth Circuit, Montgomery County, Illinois, No. 93-CF-10).) (R.Doc. 70, p. 6, Plaintiff's Exhibit) On January 12, 1995, Judge David Slater accepted plaintiff's guilty plea to a reduced count of misdemeanor theft and sentenced plaintiff. In open court and on the record during the course of that sentencing hearing, plaintiff signed a certificate of receipt acknowledging receipt of a true copy of the judgment and sentence imposed that date by the court. (R.Doc. 70, Plaintiff's Exhibit A, p. 5) The transcript of the hearing indicates it commenced at 11:00 a.m. that date in open court with the petitioner, Benjamin Anderson, and his counsel, Samuel Panos, being in open court with Judge Slater and State's Attorney Dobrinic. (R.Doc. 70, Plaintiff's Exhibit D, pp. 3-11) Petitioner's attorney indicated petitioner authorized him to withdraw his plea of not guilty and " * * * enter a plea of guilty to the information filed as amended under those terms and conditions." (R.Doc. 70, Plaintiff's Exhibit D, p. 6) Plaintiff acknowledged he understood the charge and terms of his guilty plea. (R.Doc. 70, Plaintiff's Exhibit D, p. 7) The court admonished petitioner he would be giving up his right to a jury trial with the guilty plea which plaintiff acknowledged. (R.Doc. 7, Plaintiff's Exhibit D, p. 7) Petitioner acknowledged he understood that by signing a written jury waiver and guilty plea, he was waiving his right to trial, pleading guilty and understood what his penalty would be. (R.Doc. 70, Plaintiff's Exhibit D, p. 8) Petitioner denied he was being forced into the guilty plea and denied any threats or promises had been made. (R.Doc.

70, Plaintiff's Exhibit D, p. 8) Petitioner was advised that the State's burden of proof was beyond a reasonable doubt and he again indicated he wanted to enter the guilty plea. (R.Doc. 70, Plaintiff's Exhibit D, p. 8) After finding a factual basis for the plea, the following colloquy occurred:

> The Court: "You understand if the plea is accepted you are not going to have a right to have a trial, you can't come back in the future and ask for a trial without asking for permission to withdraw your plea of guilty. And you understand there is no guarantee that will be granted?
>
> Mr. Anderson: "Yes.
>
> The Court: "And you understand if your plea is withdrawn the matter will be reset for trial and the State has the right to reinstate the other charges that were dismissed as a part of this negotiation?
>
> Mr. Anderson: "Yes, Your Honor.
>
> The Court: "You still want to proceed with your plea, is that correct?
>
> Mr. Anderson: "Yes, Your Honor." (R.Doc. 70, Plaintiff's Exhibit D, pp. 9-10)
>
> "You have a right to appeal this decision. If you want to appeal you have to file a written motion to withdraw the plea of guilty within 30 days of today setting forth the grounds for that withdrawal. You waive any issue or claim of err [sic] not raised in the motion to withdraw in the event of a later appeal.
>
> "You understand your rights to appeal?
>
> Mr. Anderson: "Yes, sir.

> The Court: "Okay, you will get a copy of the Order of Conditional Discharge in the mail. You need to discuss it fully with your attorney so you fully understand the terms and the obligations you are under.
>
> Mrs. Dobrinic: "Your Honor, I have prepared an order in advance. Counsel has had a chance to go over it with his client. If we could have it signed at this time and we will give him a copy here in open court.
>
> The Court: "Okay." (R.Doc. 70, Plaintiff's Exhibit D, p. 11)

Petitioner's guilty plea, conviction and sentence were not challenged or set aside prior to the filing of this federal civil rights claim. (R.Doc. 106, Transcript, pp. 14-17)

The facts as recited by the Court of Appeals in its opinion at 111 F.3d 494, 496-500, correctly reflect the frivolous nature of petitioner's factual allegations and legal arguments. The Court of Appeals thus imposed sanctions under Fed.R.Civ.P. 11 against petitioner's attorney, David Kahn, which are unchallenged in this Court, to-wit:

> "The Court severely criticize[d] Kahn, and Kahn admits that the criticism was justified, and he [is] no longer contesting sanctions that were assessed against him, in the amount of $9,681.95 and realizes that the sanctions could have been much more severe." (Petition at 10)

In its order allowing respondents' motions to dismiss, strike and for summary judgment (R.Doc. 72, Order) and judgment entered May 22, 1996 (R.Doc. 73,

Judgment), the district court declined to exercise its supplemental jurisdiction over plaintiff's state law claims (28 U.S.C. §1367(c)(3).) Plaintiff's state law claims were not reviewed by the Court of Appeals, and are not before this Court. The district court also found that petitioner could not state a claim for non-race-based discrimination under 42 U.S.C. §1985. (R.Doc. 72, Order, pp. 5-6) In its opinion, the Court of Appeals found that the district court properly "disposed" of petitioner's federal claims, and was correct in declining to exercise jurisdiction over plaintiff's state law claims. (111 F.3d 494, 500.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. Neither the decision below nor the record raise the Questions Presented in the petition.

The petition includes numerous misstatements of fact or law that bear on what issues should properly be before this Court if certiorari were granted.

The petition makes a new argument in this Court at pages 5, 6 and 17 suggesting there was no causal relationship between petitioner's theft charge and the restitution ordered as part of his sentence following his guilty plea to a charge of theft. Petitioner's contention was not raised in the District Court or Court of Appeals, and certainly was not among the questions presented for review in petitioner's briefs in the Court of Appeals.

The petition also suggests at page 9 that petitioner "called to the attention of the Appeals Court but not to the District Court's attention * * * two docket sheets in

which a difference pattern of words is used [sic]" in the transcript of petitioner's state court sentencing hearing. Obviously petitioner concedes in his petition that this argument was not made in the District Court. However, it was also not made in the Court of Appeals and certainly was not among the questions presented for review in the Court of Appeals.

At page 10 of the petition, it is suggested that the "most serious" alleged error in the Court of Appeals' decision is a misstatement that petitioner was seeking more than half a billion dollars in damages from the defendants. Respondents concede that the Court of Appeals misapprehended the amount of damages being sought by the petitioner, though the court's misapprehension is harmless. In fact, in petitioner's original complaint filed in the District Court on February 2, 1996, he only sought $27.7 million in damages from the defendants. (R.Doc. 1, pp. 14-15, 17-18, 20-21) In his first amended complaint filed February 26, 1996, petitioner increased his total demand to $72.75 million (R.Doc. 7, pp. 17-19, 20-23, 24-27) Though the Court of Appeals misspoke in a quantitative sense, it hit the mark qualitatively.

The Court of Appeals' decision is mischaracterized in that petitioner claims the court held that petitioner sustained constitutional injuries, but that they were insignificant. In fact, the Court of Appeals held plaintiff's claims were either barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), because plaintiff's guilty plea and conviction were not invalidated, or were "meritless." (114 F.3d 494, 498-99.) Petitioner's argument at pages 11 and 20 suggesting that the Court of Appeals held he had been subjected to an illegal search, though no

significant constitutional injury is incorrect. Instead, the Court of Appeals questioned if there "was in fact a 'search.' " (111 F.3d 494, 500.) The Court of Appeals gave plaintiff's complaint a liberal interpretation and construed his allegation of facts to be a claim of an illegal search. The court rejected even that claim, however, saying:

> "Similarly, reading the complaint in his favor, some of the facts could be construed as a claim for an illegal search when Officer Sheeley walked around Anderson's property. But Anderson failed to claim or indicate how any such search harmed him or whether it was in fact a 'search.' He did not allege that Sheeley did any damage by walking around or that anything was seized. On appeal Anderson concedes he alleged no compensable injury but argues that this claim should not have been dismissed because full discovery would have enabled him to ascertain the extent of the search and find a compensable injury to assert. A federal lawsuit, however, is not a fishing expedition. Anderson was out of jail for almost a year when he filed this case; if by then he knew neither the extent of the search nor how he was harmed by it, he can't complain when this claim, on this record, was put to rest by the district court." (111 F.3d 494, 500.)

The Court of Appeals' decision does not suggest that there is an exception to the rule of *Heck v. Humphrey* as argued at pages 20 and 11 of the petition. The Court of Appeals pointedly stated at 111 F.3d 494, 498-99 that *Heck* requires invalidation of a criminal conviction before a §1983 claimant can seek relief, the granting of which

implicates the validity of the sentence or conviction. (Citing *Heck*, 512 U.S. at 480-82, 114 S.Ct. at 2369-70; *Ryan v. DuPage County Jury Comm'n*, 105 F.3d 329, 331 (7th Cir. 1996).) Petitioner's disagreement at page 20 with what he thought the Court of Appeals held does not warrant allowance of the petition.

Two cases discussed at page 12 in the petition have been misrepresented. Plaintiff attempts to distinguish *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995), claiming that, in that case, there was an opportunity to seek a writ of habeas corpus during the plaintiff's actual imprisonment or confinement. There is no indication in the Sixth Circuit's opinion in *Schilling* that the plaintiff was incarcerated following his conviction. On the contrary, the Sixth Circuit stated that " '*Heck* applies as much to prisoners in custody (a habeas prerequisite) as to persons no longer incarcerated.' " (58 F.3d 1081, 1086.) In the instant case, the Court of Appeals expressed its agreement with the Sixth Circuit's holding in *Schilling* noting that "the fact that a plaintiff is no longer incarcerated has no bearing on the applicability of *Heck*." (111 F.3d 494, 499.) Certainly there is no conflict between the Sixth and Seventh Circuits on this point.

The other case misrepresented at page 12 of the petition is *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Petitioner suggests that the Court of Appeals misread *Jones* when it commented that there was a strong possibility that his "conditional discharge" status made him eligible for habeas relief. (111 F.3d 494, 499.) In actuality, this Court stated in *Jones* that:

" . . . in fact, as well as in theory, the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the state upon the public generally. Petitioner is confined by the parole order to a particular community, house and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at anytime, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest and temperate life. Petitioner must not only faithfully obey these restrictions and conditions but he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at anytime the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime. It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such writs are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison

> walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot. . . . " (371 U.S. 236, 242-43, 83 S.Ct. 373, 376-77, 9 L.Ed.2d 285, ___)

Under *Jones*, habeas relief may be obtained whenever the conditions significantly restrain the petitioner's liberty to do those things which in this country free men are entitled to do. Petitioner concedes that his conditional discharge prohibited him from possessing a firearm, required him to report a change of address within twenty-four hours and imposed other restrictions on him. Since conditional discharge could be withdrawn and a jail sentence imposed on the convicted person merely by proof by a preponderance of the evidence that petitioner violated some other law, there is indeed a strong possibility as the Court of Appeals noted that petitioner's conditional discharge status made him eligible for habeas relief.

The awkward argument at pages 17-20 of the petition that petitioner's constitutional rights were violated by the "wilful and deliberate failure [of] Officer Sheeley to have

him arrested when he found where he was" (petition at 20) was not presented in the courts below. Certainly, it was not part of petitioner's argument at the June 4, 1996, hearing in the District Court wherein petitioner characterized Special Agent Sheeley's involvement in petitioner's arrest and return to Illinois from Missouri. (R.Doc. 106, Transcript, pp. 32-37) It seems novel for petitioner to now argue he has a constitutional right to be arrested.

Overall, the record in this case is barren of any indication petitioner at any time prior to the filing of this suit raised a challenge to his guilty plea and conviction or sought to have it set aside. The guilty plea and conviction have in fact never been vacated. The transcript of the January 12, 1995, hearing at which the Illinois court accepted plaintiff's guilty plea and imposed sentence was filed of record by the petitioner and refutes his later arguments suggesting the transcript was falsified and he was not actually in attendance at the hearing. (R.Doc. 70, Plaintiff's Exhibit D) In the course of that sentencing hearing and in open court, plaintiff even signed a certificate acknowledging receipt of a true copy of the judgment and sentence the court imposed at that time! (R.Doc. 70, Plaintiff's Exhibit A, p. 5) Both the District Court and Court of Appeals held that petitioner's complaint attempted to state a claim barred under the teaching of *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), because petitioner's guilty plea, conviction and sentence had not been reversed on direct appeal, expunged by executive order, invalidated by a state tribunal authorized to make such a determination or called into question by a federal court's grant of a

writ of habeas corpus, or otherwise. Respondents respectfully submit that once petitioner was alerted to the significance of *Heck v. Humphrey*, he commenced this vain quest to sidestep *Heck's* clear and settled requirements.[1]

II. Petitioner's claim is barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

As the Court of Appeals pointed out at 111 F.3d 494, 499, plaintiff's claim is barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), because petitioner's state court conviction sat undisturbed when the suit was filed and remains undisturbed. Petitioner's further argument that he had no opportunity to challenge his guilty plea and conviction because habeas corpus relief was not available to him was itself settled by the majority opinion in *Heck* which states:

---

[1] The District Judge commented on this, saying to petitioner's counsel:

> "Now, you can't simply come in at the last minute, after somebody else in a pleading alerts you to something that you should have done before, and then play catch-up. Now, it can't be done. And it wasn't until after all of this came to fruition, to a head, that you decided after seeing some law and seeing the other circuits; what's that, the Third Circuit case and one or two others; that you then filed for post-conviction relief.
>
> "Now, I will tell you what I'm not going to do. I'm not going to have these little technicalities be brought up after the fact, long after they should have been raised." (R.Doc. 106, Transcript, p. 16)

> "Justice SOUTER also adopts the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but thinks it necessary to abandon that principle in those cases . . . involving former state prisoners who, because they are no longer in custody, cannot bring post-conviction challenges. . . . We think the principle barring collateral attacks – a long-standing and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." (512 U.S. at 490 n.10, 114 S.Ct. at 2374 n.10, 129 L.Ed.2d 383; quoted at 111 F.3d 494, 499.)

The fact that a civil rights plaintiff is no longer incarcerated has been held to have no bearing on the applicability of *Heck* as a prerequisite to the filing of a §1983 claim which is premised upon or requires a finding that a criminal conviction or sentence was invalidly obtained.

In the District Court, petitioner's counsel eventually recognized that *Heck* is fatal to petitioner's claim. Conceding that Fed.R.Civ.P. 11 sanctions could properly be imposed on him for failing to research any law before filing suit, petitioner's counsel further conceded that his attempt to distinguish *Heck* was incorrect saying:

> "And I understand the Court's position, I have to admit that for an attorney of thirty years not to artfully draw pleadings, there's no excuse for it. I can understand the Court's assessing sanctions against me. But I would hope is that the case against my client would not be dismissed. I would hope at the very least it would be held in abeyance.

> "And one thing I must do for the record, Your Honor, if you will permit me to. I think there's different interpretations of *Heck v. Humphrey*. I think that very possibly, and probably based upon your many years experience, your interpretation of *Heck v. Humphrey* is correct and mine is wrong. The way I read *Heck v. Humphrey* is that 47 [sic] justices said, doesn't apply in a situation where federal habeas corpus is not available. Now – and I read that that would apply to the majority plea.
>
> "Now, I may have misinterpreted that case. But at the very, very least, I think that whether or not to penalize me is not as important as if my client is given an opportunity to state a case.
>
> "What I have prepared was inappropriate to file, . . . " (R.Doc. 106, Transcript, p. 20)

Petitioner's arguments in favor of certiorari have been previously considered by this Court and resolved by the majority decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Had petitioner's counsel conducted the inquiry required by Rule 11 before filing this suit, the frailty of the claim would have been apparent. No compelling reasons exist for allowing the petition. The decision of the Court of Appeals adheres to this Court's teaching in *Heck v. Humphrey*, is not in conflict with the decision of any other Court of Appeals, does not decide an important federal question in conflict with a decision by the highest court of any state, and does not sanction the departure by a lower court from accepted and usual courses of judicial proceedings so as to call for

an exercise of the supervisory powers of this Court. (Sup.Ct.R. 10(a) (1997).)

CONCLUSION

For the reasons set forth herein and in the published opinion of the Court of Appeals for the Seventh Circuit, and the final order and judgment of the District Court for the Central District of Illinois, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES C. COOK
WALKER AND WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62226
(618) 277-1000
FAX: (618) 233-1637
Counsel for Respondents Dobrinic and Vazzi

KELLY D. LONG
KELLY LONG LAW OFFICE
P. O. Box 216
Hillsboro, Illinois 62049
(217) 532-6632
Counsel for Respondent Long

KAREN KENDALL
CRAIG L. UNRATH
HEYL, ROYSTER, VOELKER & ALLEN
600 Bank One Building
Peoria, Illinois 61602
(309) 676-0400
Counsel for Respondents Panos and Illini Bank

PATRICK J. LONDRIGAN
HEYL, ROYSTER, VOELKER & ALLEN
Suite 575
First of America Center
P. O. Box 1687
Springfield, Illinois 62705
(217) 522-8822
Counsel for Respondents Panos and Illini Bank

JON GRAY NOLL
Noll Law Office
509 West Capitol
Springfield, Illinois 62704
(217) 544-8441
Counsel for Respondent Illini Bank

D. BRADLEY BLODGETT
HINSHAW & CULBERTSON
400 South Ninth Street
Springfield, Illinois 62701
(217) 528-7375
Counsel for Respondent Nations Bank

Supreme Court, U.S.
FILED
OCT 20 1997
CLERK

(3)

No. 97-422

In The
Supreme Court Of the United States
October Term, 1997

BENJAMIN M. ANDERSON,
Petitioner,

v.

SAMUEL W. PANOS,
an individual;
KATHRYN DOBRINIC,
in individual capacity;
MICHEAL SHEELEY,
in individual capacity;
JAMES VAZZI,
in individual capacity;
BOATMEN'S NATIONAL BANK OF CENTRAL ILLINOIS (Now NATIONS BANK);
COFFEEN STATE BANK AND TRUST COMPANY (Now ILLINI BANK), a Corporation;
Respondents.

REPLY TO BRIEF IN OPPOSITION

David M. Kahn
Counsel of Record
229 S. Main Street
P.O. Box 68
(618) 939 6013

27pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person who pleads guilty to a misdemeanor and is placed on conditional discharge is deemed in custody for purpose of being able to apply for a writ of habeas corpus.

(Petitioner adopts Respondents Question 1)

2. Whether a person who was illegally convicted, but who was never been able to bring a habeas corpus action because he was never in custody, is that person required by the holding of Heck v. Humphrey, to have the conviction set aside before pursuing a Title 42 §1983 claim, for money damages for serious constitutional violations such as 1) Guilty plea being obtained by coercion and duress, 2) An alleged totally false and fabricated transcript of the sentencing hearing which transcript shows that he was advised of various constitutional and procedural rights 3) Payment of restitution that in no way or manner is related to the offense charge with 4) Search without consent or search warrant of the property of the person convicted as well as the search of separate property of his father and adult daughter, and further the concealing of the search of these properties, 4) undisputed payment of substantial fine and restitution, as part of the criminal conviction.

3. Whether Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.E.d.2 383 (1994) bars a suit under 42 U.S.C. §1983 which allegedly, does not impeach the validity of the plaintiff's conviction which has not been vacated.

(Petitioner adopts Respondents Question 3)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

JURISDICTION..... 1

ILLINOIS SUPREME COURT RULE AND COMMENTARIES..... 1-3

I. REPLY TO NEW MATTERS, CONTAIN IN BRIEF IN OPPOSITION..... 3-9

REPLY TO NEW MATTERS CONTAINED IN BRIEF IN OPPOSITION

CONCLUSION..... 9

APPENDIX..... App. 1

A. Transcript of sentencing hearing of January 12, 1995..... App. 1

Jury Waiver And Plea of Guility..... App. 14

TABLE OF AUTHORITIES

Court Rules and Commentaries Page

Illinois Supreme Court Rule 402..... 1,2,4,5

Commentaries to Supreme Court Rule 402..... 1,2,3,4,5,6

Federal Rule 11..... 5,6

Cases

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 374 (1969)..... 2,3,4,7

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)..... 9

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1666, 122 L.Ed.2d 418 (1969)..... 5,6

People v. Cummings, 7 Ill. App. 3d 306, 287 N.E. 2d 291 (2d Dist. 1972)..... 5,6

Schilling v. White. 58 F.3d. 1081, (6th Cir. 1995)..... 9

U.S. v. Gallman, 907 F.2d 639 (7th Cir. 1990)..... 8

U.S. v. Hoggard, 61 F.3d 540 (7th Cir. 1995)..... 8

U.S. v. Jackson, 390 F.2d 130, (7th Cir. 1969)..... 2

U.S. v. Williams, unpublished, Central District of Illinois No. 30045, (included in appendix)..... 7,8

Statutes of the United States

42 U.S.C. § 1983..... 9

JURISDICTION

This Court has jurisdiction to review by writ of certiorari, the April 4, 1997, Judgement of the Court of Appeals (28 U.S.C. § 1254(1).) The judgement concerns a cause of action under 42 U.S.C. § 1983 for money damages where the underling conviction has not been set aside or otherwise invalidated.

ILLINOIS SUPREME COURT RULE 402 AND COMMENTARIES

Illinois Supreme Court Rule 402, set forth in Illinois Revised Compiled Statutes provides in part:

Rule 402. Pleas of Guilty

In hearing on pleas of guilty, there must be substantial compliance with the following:

(a) **Admonitions to Defendant.** The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of an determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law including when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences.

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty; and

(4) That if he pleads guilty there will not be a trial of any kind, so by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) **Determining Whether the Plea is Voluntary.** The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of

a plea agreement, the agreement shall be stated in open court. The court, questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force threats of any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determine Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

Portions of Committee (appointed by the Illinois Supreme Court) Comments revised January 5, 1981 set out after Supreme Court Rule 402, Smith Hurd Annotated Illinois Statutes, are as follows:

> "...The Supreme Court of the United States had recently held that it is a violation of due process to accept a guiltily plea in State criminal proceedings without an affirmative showing, placed on the record, that the defendant voluntarily and understandingly entered his plea of guilty. (Boykin v. Alabama (1969) 395 U.S. 238).....
>
> Two major objectives of new Rule 402 are to: (1) to insure compliance with the Boykin requirements and (2) to give visibility to the plea agreement process and thus provide the review court with a record containing an accurate and complete account of all relevant circumstances surrounding the guilty plea. See United States v. Jackson, 390 F.2d 130 (7th Cir. 1968).
>
> Paragraph (a) sets forth the admonitions which must be given to the defendant to insure that his guilty plea is intelligently and understandingly made, as required by Boykin. Subparagraph (1) requires that the defendant be informed of the nature of the charge..... Subparagraph (2) requires that the

defendant also be informed of the minimum and maximum sentences prescribed by law. Sub-paragraphs (3) and (4) cover the requirements enumerated in Boykin, namely the record on a guilty plea affirmatively show a waiver of "three important federal rights"; the privilege against self-incrimination; the right to trial by jury; and the right to confront's one accusers.

REPLY TO NEW MATTERS THEREIN RESPONDENTS' BRIEF IN OPPOSITION

Petitioner's of Writ of Certiorari, alleges that he never appeared in Montgomery County Circuit Court criminal case 93-CF-10, contrary to purported transcript of the sentencing hearing of January 12, 1995, see appendix pages 1-13.

If Respondents had referred to the transcript to proof that Petitioner did in fact appear before the sentencing Judge, this would not constitute a new matter --- however, Respondent in their summary of facts, go beyond old matters in making detailed references to specific portions of the transcript for purpose of showing what sentencing Judge said in advising Petitioner of his constitutional rights. Only quoting the transcript for what the sentencing Judge said is misleading without also pointing out what constitutional rights the transcript evidences and shows Petitioner was not advised of.

An additional reason for replying to references in the transcript, is that on August 21, 1997, the sentencing Judge, issued a Certificate of Correctness regarding the transcript of January 12, 1995. Such Certificate of Correctness was incorporated into the original transcript and is page number 13 of the transcript, and thus became part of the transcript rather than being entered as a separate court order. Such Certificate of Correctness was not attached to writ of certiorari solely because Petitioner was unaware of same until after this writ of certiorari was filed. Such Certificate was entered

without notice to Petitioner and without being entered in the Montgomery County Circuit Docket Sheets for case No 93-CF-10. Further, such Certificate of Correctness was not indexed when the circuit court's file was transferred to the Fifth District Illinois Appellate Court, Appellate Case No. 5-97-0487. Petitioner has filed in the aforesaid appellate court a motion to set aside or strike said certificate of correctness, but to date same has not been ruled on.

The transcript of sentencing hearing of January 12, 1995, included in Appendix herewith, at pages 1-13 shows Petitioner was not advised of his right to confront witnesses and right against self-incrimination, rights necessary for fundamental fairness in accordance with Boykin v. Alabama, 395 U.S. 238, 89 S.Ct 1709, 23 L.Ed2d. 374, (1969).

Illinois Supreme Court Rule 402, was made to secure compliance with rights guaranteed by Boykin v. Alabama, supra. Rule 402 subparagraphs (3) & (4) specify the requirements enumerated in Boykin, namely that the record of a guilty plea affirmatively show a waiver of "three important federal rights" i.e.: right to trial by jury; and right to confront one's accusers. Nowhere in subparagraphs (3) and (4) is the privilege against self-incrimination mentioned --- however, set forth on pages, one and two of this brief the commentary to Rule 402 states such right is embraced in advising a Defendant of his right to a jury trial and right to confront one accuser(s). The transcript is silent on the right to confront one accusers, therefore it is also silent on constitutional right against self incrimination.

Respondents raise a new matter on page three of their brief, stating:

> "Petitioner acknowledged he understood that by signing a written jury waiver and guilty plea, he was waiving his right to trial, pleading guilty and understood what his penalty would be." (R.Doc. 7,

Plaintiff's Exhibit D, p. 7, appendix page 14.

Petitioner acknowledges signing jury waiver and guilty plea. However waiver & plea is not sufficient to waive constitutional rights even if the waiver of these right are set forth in detail in a written plea agreement. People v. Cummings, 7 Ill. App. 3d 306, 287 N.E. 2d 291, (2d Dist. 1972).

As to Respondents claim that Petitioner was advised of his constitutional rights; It is noted not only does the transcript show Petitioner was not advised of his constitutional rights, but also that he was not advised of rights that are closely related thereto, i.e. failure of sentencing court to obtain a factual basis as to why restitution should be paid for bank loans not related to the criminal charge against the Defendant. In People v. Cummings, supra page 307 at 7 Ill. App.3d, in recognizing that Illinois Supreme Court Rule 402 is analogous to the procedural safe guards required by McCarthy v. United States, 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1666, (1969), and Federal Rule 11 states:

> "***The court***shall not accept such plea [plea of guiltily]***without first addressing the defendant personally and determining that the plea is made voluntarily with understanding the nature of the charge and the consequence of the plea***. "The court shall not enter judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." "The necessity for personal admonishment by the court and the need for a factual determination in support of the plea was recognized by the United States Supreme Court when it interpreted Rule 11 in McCarthy v. United States, 394 U.S. 459,, 89 S. Ct. 1166, 22 L.Ed.2d 418 (1969). *** "Moreover because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntarily unless the defendant possesses an understanding of

> the law in relation to the facts." "Thus in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea***Requiring this examination of the relation between the law and the acts defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." "22 L.Ed.2d 425, 426 "The same underlying principles applicable to Rule 11 found in McCarthy, supra are also found in Illinois under Rule 402. (Citation omitted)

In the case at bar, nowhere in the transcript, appendix pages 1-13 is there set forth any factual basis for including two different Banks, regarding restitution for loans that were unrelated to the original felony indictment and unrelated to the reduced misdemeanor charge. While not certified as an issue to the appellate Court, there being no causal relationship between the sentence and restitution was called to the attention of the Appellate and District Court, Petitioners Brief to the Seventh Circuit, on page 12. In the transcript of hearing before Judge Richards Mills, on June 4 1997 at page 35 lines 6 though 20 there being no basis for restitution was set forth by Petitioner's counsel.

In the case at bar the Petitioner was not advised of the consequences if he pled guilty at the sentencing hearing contrary to the express provisions of Rule 402 sub-paragraph(a) 2, on page 2 of this brief, providing that he be advised of the minimum maximum sentence. Further as noted in Cummings, supra the Court needs to explain to the Petitioner the consequences of his plea, without being advised as to the minimum-maxim sentence the Defendant could not understand the consequences of this plea.

Due to ineffective assistance of counsel by Kahn, failure of the sentencing Judge not advising the Petitioner of his constitutional and related guarantees, were not brought to the attention of either the District or Seventh Circuit Appellate Court. Ineffective assistance of counsel is evidenced by the sanctions imposed on Kahn. But under the plain error doctrine, as set forth in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969) this court can still review if Petitioner intelligently and knowingly waived his right to plead not guilty. In Boykin, at page 242, it is stated:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review."

In the case at bar, as in Boykin, issue of intelligent and voluntary waiver was not considered by the trial Court. Unlike Boykin, the Seventh Circuit Appellate Court did not consider, if Petitioner's guilty plea was intelligently made in light of 1) failure to give two of the three fundamental admonishments, (right to confront witness, right against self incrimination), 2) If there was a factual basis made for paying restitution as part of the sentence, 3) If Petitioner's failure to be advised of minimum-maximum sentence, by sentencing Judge, made his plea resulted in his being unaware of the legal consequences of a plea of guilty. An unpublished United States District Court opinion (prepared by Judge Richard Mills who issued summary Judgment against Petitioner) Central District of Illinois Order, United States v. Williams, No. 95-30045, pages 6 and 7:

> "[In the Seventh Circuit]" "a defendant may not collaterally attack a prior state conviction at sentencing unless the conviction is presumptively void -- that is,

> the lack of constitutionally guaranteed procedures is plainly detectable from the face of the record". United States v. Hoggard, 61 F.3d 540, 542 (7th Cir. 1995). ....."Importantly, where no record exists from a challenged conviction, "the court may accept testimony establishing the 'custom and practice' of the trial court in following proper procedures.

Further in United States v. Gallman, 907 F.2d 639 (7th Cir. 1969), after stating that the Defendant has the burden of proof to proof that he was not advised of his constitutional rights at sentencing, the court notes in footnote 4 on page 643, "In some circumstances, for example where the certified record of conviction indicates on its face that conviction was unconstitutional the defendant's burden is automatically met and the defendant need introduce no evidence at all." In the case at bar, Petitioner should not have to proof he was not advised of his constitutional rights since failure to advise him of his constitutional rights is apparent from the record, (transcript).

Although Williams, and Hoggard cases, supra, were concerned with constitutional right to counsel, and were in content of whether prior conviction could be considered in assessing punishment, the rational of these cases are applicable to the case at bar in pondering other constitutional rights. In the case at bar, the transcript of the sentencing hearing certified correct by the sentencing Judge, shows there was a failure to advise of two aforesaid fundamental constitutional rights.

Also in regards to plain error the Appellate Court in U.S. v. Hoggard, supra, states on page 543:

> "Arguments made for the first time on appeal are reviewed for plain error only (citation omitted). As already noted, state judicial proceedings are accorded a presumption of regularity"

In the case at bar, silence of the record shows that the Petitioner was not advised of two fundamental constitutional rights, thus, no such presumption of regularity applies, and review by this Court for plain error is appropriate.

Even if the plain error doctrine is applicable, and assuming also that the Court finds that Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), is applicable to bar collateral attack, the plain error doctrine will only result in this case being remanded in part if the Seventh Circuit's interpretation that a suit is not barred under 42 U.S.C. Section 1983, for a constitutional violation that does not impeach the validity of the conviction, applies. In Schilling v. White, 58 F.3d 1081 (6th Cir. 1995), at 1086 the contrary Third Circuit's interpretation is set forth, to wit:

> "The Seventh Circuit misreads Heck. The fact that a Fourth Amendment violation may not necessarily **cause** an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an **constitutional injury**. The Court explicitly foreclosed this line of reasoning in Heck, when it is concluded that because an illegal seizure does not automatically render a conviction invalid, an illegal seizure does not alone create a injury compensable under § 1983."

CONCLUSION

In the interest of justice and for the reasons as set forth herein and as set forth therein Petitioner's writ of certiorari, the petition for writ of Certiorari should be allowed.

Respectfully submitted

David M. Kahn

229 S. Main
P.O. Box 68
Waterloo, IL 62298
(618) 939-6013

STATE OF ILLINOIS
IN THE CIRCUIT COURT FOR
THE FOURTH JUDICIAL CIRCUIT COURT
MONTGOMERY COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 93-CF-10
	)	
BENJAMIN M. ANDERSON, a/k/a TERRY L. CAIN, a/k/a BUDDY BLAYLOCK,	)	
	)	
Defendant.	)	

HEARING ON NEGOTIATED PLEA PROCEEDINGS

Before: HONORABLE DAVID W. SLATER
Associate Judge

On: January 12, 1995

FILED
JUL 30 1997
DANIEL B. BILLINGTON
Circuit Court Clerk
4 TH Judicial Circuit

BE IT REMEMBERED that on to-wit: January 12, 1995, the above-entitled cause held as follows, to wit:

TED MERANO CSR
OFFICIAL COURT REPORTER
303 West Summer Street
Hillsboro, Illinois 62049

APPEARANCES:

KATHRYN DOBRINIC
State's Attorney
Montgomery County
Courthouse
Hillsboro, Illinois

on behalf of the State,

SAMUEL PANOS
Attorney At Law
7531 Forsyth
Clayton, Missouri

on behalf of the Defendant.

January 12, 1995 - 11:00 A.M.
Hearing in open court.

THE COURT: 93-CF-10, People versus Terry Cain also known as Buddy Blaylock also known as Benjamin Anderson.

MRS. DOBRINIC: Mr. Anderson is present with his Counsel. This is set for pretrial. I believe today we have a negotiated plea to present to the Court for your consideration.

THE COURT: Terms?

MRS. DOBRINIC: Your Honor, it's my understanding the Defendant will enter a plea of guilty as to Count II, which I would be filing instanter. That count would allege the offense of Theft Less than $300.00 in Value. In exchange for a plea of guilty to that charge Count I

of the indictment would be dismissed against the Defendant. And he would be sentenced to two years, 24 months conditional discharge. He would have the customary terms and conditions. We have prepared an Order in advance deleting some of those terms. There would be a special condition that he would pay a fine of $1,000.00 instanter; he would pay court costs instanter; he would pay restitution to Boatmen's Bank of Hillsboro, Illinois in the amount of $930.72 instanter; he would be ordered to pay restitution to Illini Bank of Coffeen, Illinois in the amount of $6,000.00. The balance of his bond which is up right now not covering those first three items would be applied to this restitution to the Illini Bank. Then he would be ordered to pay the balance in 24 equal monthly payments. Those payments to start the 1st day of March and due the 1st day of each month thereafter until paid in full. The Defendant would also be ordered to serve 26 days in the Montgomery County Jail and he would be given credit for 26 days served.

This is a case, your Honor, that involves the Defendant's use of the name Terry Cain in executing documents to J.I. Case to obtain possession and financing of a Uniloader which was ultimately recovered from the Defendant and returned to J.I. Case.

It's the understanding of the parties, I believe, and I want to state this in open court that these lending institutions, Boatmen's Bank and Illini Bank, may claim other amounts from the Defendant such as expenses for collection or attorney's fees or interest, which we are not saying by this Order that is the total amount due. But, that is the total amount this Defendant owes under our Order here.

THE COURT: Have they been notified?

MRS. DOBRINIC: Yes. I obtained, I spoke to Mr. Long this morning who is the attorney for Boatmen's Bank. I believe there was a matter before the Court this morning on that, may be. So, Boatmen's Bank is aware. I did not speak with the person I was dealing with normally on the Illini Bank matter, but these, those are the figures they gave us to obtain as restitution on this. Also, your Honor, I don't have authority to make any representations about what might or could or may not happen as far as Federal laws are concerned and so this plea doesn't incorporate any kind of understanding on any possible violation of a Federal statute.

THE COURT: Prior record?

MRS. DOBRINIC: According to the printout that I have the Defendant has no prior record and perhaps he should be

asked to make a representation to that fact in court before the Court accepts the plea.

THE COURT: Is this going to be reporting to anybody?

MRS. DOBRINIC: No, sir, your Honor.

THE COURT: Are those the terms of the plea as you understand them, Counsel?

MR. PANOS: Yes, your Honor. And Mr. Anderson has authorized me to withdraw his plea of not guilty and enter a plea of guilty to the information filed as amended under those terms and conditions.

THE COURT: Do you have the new information?

MR. PANOS: No, I don't.

THE COURT: Do you have the information?

MRS. DOBRINIC: You have to change one thing on there, the cite. I just need to change the cite. It should read 16-I(a)(2)(A), which talks about obtaining by deception instead of obtaining or exerting unauthorized control. He is charged with, the wordage is correct, just the cite isn't.

THE COURT: Is that all right?

MR . PANOS: That is fine.

MRS. DOBRINIC: Your Honor, at this time I am tendering the information, Count II.

THE COURT: Mr. Anderson, you understand you are

charged with in Count II now alleging the offense of Theft Less than $300.00?

MR. ANDERSON: Yes, your Honor.

THE COURT: Do you understand that if you plead guilty to that charge you are going to be placed on 24 months conditional discharge, normal terms to apply. In addition thereto you will be ordered to pay a fine of $1,000.00, plus costs, make restitution in the amount of $930.72. Who did you say that was to be paid to?

MRS. DOBRINIC: Yes, your Honor, that was to Boatmen's Bank. Boatman's Bank of Hillsboro.

THE COURT: Boatmen's Bank. And the sum of $6,000.00 to Illini Bank.

MRS. DOBRINIC: Correct.

THE COURT: The bond will be applied and the balance due in 24 equal monthly installments beginning March 1, 1995. You will be sentenced to 26 days in the Montgomery County Jail and given credit for 26 days served. Do you understand the teems of the plea?

MR. ANDERSON: Yes, your Honor.

THE COURT: Do you understand that you have a right to a trial by jury which you give up if you plead guilty?

MR. ANDERSON: Yes, sir, your Honor.

THE COURT: I have before me a Jury Waiver and Plea of Guilty to the Offense of Theft (Under $300.00); is that your signature?

MR. ANDERSON: Yes, sir.

THE COURT: Do you understand by signing that you are giving up any right you have to a trial and you are pleading guilty to the charge and you understand what the penalty is going to be?

MR. ANDERSON: Yes, sir.

THE COURT: That is what you want to do, is that correct?

MR. ANDERSON: Yes, your Honor.

THE COURT: Anybody forcing you to do this, make any threats or promises to get you to do this?

MR. ANDERSON: No, your Honor.

THE COURT: Do you understand the State would have to prove you guilty beyond a reasonable doubt before you would be found guilty of any offense?

MR. ANDERSON: Yes, sir, your Honor.

THE COURT: Okay, you also understand that the State is dismissing Count I as part of this plea and that this will be entered, the plea will be entered in the State case, but if the Federal authorities decide to file charges against you for a violation of Federal law this is not a bar to them

doing that?
MR. ANDERSON: Yes, your Honor.
THE COURT: And you still want to proceed with your plea of guilty?
MR. ANDERSON: Yes, sir, your Honor.
THE COURT: I, I Will find that you knowingly and voluntarily enter this plea of guilty.
Factual basis for the plea?
MRS. DOBRINIC: Your Honor, if this case were to proceed to trial the State would present the testimony of witnesses who would indicate that on or about March 10, 1990, Defendant was present in Montgomery County, Illinois at a time that he executed certain documents with J.I. Case, by way of a business in this county known as Voils Brothers International. And by doing so he obtained possession of a J.I. Case Uniloader, Model # 1840. And that he did so by deception using the name of Terry Cain on those documents.
THE COURT: Is that essentially what occurred, Mr. Anderson?
MR. ANDERSON: Yes, your Honor.
THE COURT: Court will find there is a factual basis for the plea.
You understand if the plea is accepted you are not going to have a right to have a trial, you can't come back

in the future and ask for a trial without asking for permission to withdraw your plea of guilty. And you understand there is no guarantee that will be granted?

MR. ANDERSON: Yes.

THE COURT: And you understand if your plea is withdrawn the matter will be reset for trial and the State has the right to reinstate the other charges that were dismissed as a part of this negotiation?

MR. ANDERSON: Yes, your Honor.

THE COURT: You still want to proceed with your plea, is that correct?

MR. ANDERSON: Yes, your Honor.

THE COURT: Okay, you will be found guilty of Count II of the information alleging the offense of Theft Under $300.00. You will be placed on 24 months conditional discharge, standard terms to apply. Ordered to pay a fine of $1,000.00, plus costs. Restitution of $930.72 to Boatmen's Bank. Both of those are to be paid immediately. Restitution in the amount of $6,000.00 to be paid to Illini Bank with the bond applied. Balance due in 24 equal monthly installments beginning March 1st. You also will be sentenced to 26 days in the Montgomery County Jail with credit for 26 days served. Judgment will be entered on the plea.

You have a right to appeal this decision. If you want to appeal you have to file a written motion to withdraw the plea of guilty within 30 days of today setting forth the grounds for that withdrawal. You waive any issue or claim of err not raised in the motion to withdraw in the event of a later appeal.

You understand your rights to appeal?

MR. ANDERSON: Yes, sir.

THE COURT: Okay, you will get a copy of the Order of Conditional Discharge in the mail. You need to discuss it fully with your attorney so you fully understand the terms and the obligations you are under.

MRS. DOBRINIC: Your Honor, I have prepared an Order in advance. Counsel has had a chance to go over it with his client. If we could have it signed at this time and we will give him a copy here in open court.

THE COURT: Okay.

MRS. DOBRINIC: Thank you, your Honor.

HEARING CONCLUDED

STATE OF ILLINOIS
MONTGOMERY COUNTY

I, TED MERANO, Official Court Reporter in and for the Fourth Judicial Circuit, do certify the foregoing to be a complete and accurate transcript of the Negotiated Plea Hearing of the defendant, Benjamin Anderson, No. 93-CF-10, which was held on the 12th day of January 1995, at the courthouse in Hillsboro, Montgomery County, Illinois, before the Honorable David W. Slater, one of the Associate Circuit Court Judges of the Fourth Judicial Circuit.

Date: 5-6-96

Enter: S/TED MERANDO
TED MERANO - CSR

STATE OF ILLINOIS
MONTGOMERY COUNTY

PEOPLE v. ANDERSON
No. 93-CF-10

AND THE COURT having examined the same and being satisfied with the correctness thereof cloth hereunder sign and order said transcript of the Negotiated Plea Proceedings held on the 12th day of January, 1995, to be filed as a part of the record in said cause on appeal.

Dated: 8 / 21 / 97

Enter: S/David W. Slater
JUDGE DAVID W. SLATER

IN THE CIRCUIT COURT
OF THE
FOURTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ILLINOIS

FILED
JAN 12 1995
ROY HERTEL
CIRCUIT COURT CLERK

PEOPLE OF THE STATE OF ILLINOIS

vs. No. 93 CF 10 Count II

Benjamin M. Anderson aka
Terry L. Cain aka Buddy Blaylock

JURY WAIVER AND PLEA OF GUILTY

And now, this 12th day of January, 19 95, before the Honorable Judge David Hoker, comes the above named Defendant, and enters his or her plea of guilty to ONE COUNT of an Information charging:

THEFT (under $ 300.00)

The Defendant is first admonished by the Court that the punishment for such offense is **a term of incarceration in the county jail of up to 364 days, and/or a fine not to exceed $1000.00, or both, up to those maximums**. The Defendant is further advised by the Court that the Defendant is entitled to a trial, either by the Court or by a Jury.

The Defendant still persists in his or her plea of guilty and states that he or she is 49 years of age, and in his or her own proper person, waives trial by the Court or by a Jury in the above entitled cause and requests the above named Judge of the Circuit Court to accept his or her plea of guilty and to enter judgment on said plea and fix the penalty, as provided by law, without the intervention of a Jury.

X/ s/Benjamin M. Anderson
Defendant

(4)

Supreme Court, U.S.
FILED
OCT 24 1997
CLERK

No. 97-422

In The
Supreme Court Of the United States
October Term, 1997

BENJAMIN M. ANDERSON,
Petitioner,

v.

SAMUEL W. PANOS,
an individual;
KATHRYN DOBRINIC,
in individual capacity;
MICHEAL SHEELEY,
in individual capacity;
JAMES VAZZI,
in individual capacity;
BOATMEN'S NATIONAL BANK OF CENTRAL ILLINOIS (Now NATIONS BANK);
COFFEEN STATE BANK AND TRUST COMPANY (Now ILLINI BANK), a Corporation;
Respondents.

SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

David M. Kahn
Counsel of Record
229 S. Main Street
P.O. Box 68
(618) 939 6013

6 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person who pleads guilty to a misdemeanor and is placed on conditional discharge is deemed in custody for purpose of being able to apply for a writ of habeas corpus.

(Petitioner adopts Respondents Question 1)

2. Whether a person who was illegally convicted, but who was never been able to bring a habeas corpus action because he was never in custody, is that person required by the holding of Heck v. Humphrey, to have the conviction set aside before pursuing a Title 42 §1983 claim, for money damages for serious constitutional violations such as 1) Guilty plea being obtained by coercion and duress, 2) An alleged totally false and fabricated transcript of the sentencing hearing which transcript shows that he was advised of various constitutional and procedural rights 3) Payment of restitution that in no way or manner is related to the offense charge with 4) Search without consent or search warrant of the property of the person convicted as well as the search of separate property of his father and adult daughter, and further the concealing of the search of these properties, 4) undisputed payment of substantial fine and restitution, as part of the criminal conviction.

3. Whether Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.E.d.2 383 (1994) bars a suit under 42 U.S.C. §1983 which allegedly, does not impeach the validity of the plaintiff's conviction which has not been vacated.

(Petitioner adopts Respondents Question 3)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

I. REASON FOR SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION..... 1-2

APPENDIX..... 1-2

Appellate Court Of Illinois ORDER Filed on October 21, 1997..... App 1-2

SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

I. REASON FOR THIS SUPPLEMENTAL BRIEF IS TO ADVISE OF THE STRIKING OF THE TRIAL COURT'S CERTIFICATE OF CORRECTNESS PERTAINING TO TRANSCRIPT OF SENTENCING HEARING OF JANUARY 12, 1995

On pages 3 and 4 of Petitioner's Reply To Brief In Opposition, it was set forth that after the writ of certiorari was filed, it became known that without notice to Petitioner or to Petitioner's counsel, and without being indexed or properly indexed in the court record, and without notice to the Appellate Court Of Illinois, the trial Judge issued on August 21, 1997, a certificate of correctness on the transcript of sentencing hearing of January 12, 1995. On page 4 it is noted:

> "Petitioner has filed in the aforesaid appellate court a motion to set aside or strike said certificate of correctness, but to date same has not been ruled on."

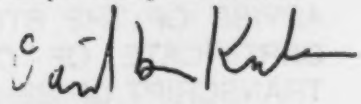
I first became aware that my motion to strike was allowed upon receiving notice of the October 22, 1997, Court Order from the Appellate Court of Illinois, Fifth District,

The holding of the Appellate Court as set forth on page 2 of it's Order (App 2) is as follows:

> "Inasmuch as the trial court cannot amend the January 12, 1995, transcript, which is in the nature of an exhibit filed in support of the motion for relief from judgment, it likewise cannot certify to it's correctness."

A reproduction of the full Order is included herewith in the appendix.

Respectfully submitted



David M. Kahn
229 S. Main
P.O. Box 68
Waterloo, IL 62298
(618) 939-6013

App 1

FILED
OCT 21 1997
LOUIS E. COSTA
CLERK, APPELLATE COURT, 5th DISTRICT

No. 5-97-0487

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit
	) Court of Montgomery
Plaintiff-Appellee,	) County.
	)
v.	)
	) No. 93-CF-10
BENJAMIN M. ANDERSON,	)
	)
Defendant-Appellant.	)

ORDER

This cause has been considered on defendant's motion to strike the trial court's certification of correctness of a transcript of proceedings conducted on January 12, 1995; and the court being advised in the premises, finds:

That on August 18, 1997, defendant filed a motion in this court for an extension of time to file the record on appeal. Defendant explained in his motion that additional time was required to enable the trial court to consider a motion to correct record filed in that court pursuant to Supreme Court Rule 329. Specifically, defendant wanted the trial court to correct the January 12, 1995, transcript to reflect defendant's absence from the courtroom during the guilty plea proceedings. On September 16, 1997, this court denied defendant's motion. The order contained the following pertinent language regarding the nature of the transcript and the inability of the trial court to entertain a

Supreme Court Rule 329 motion to correct:

> "That the fundamental flaw in defendant's resort to Supreme Court Rule 329 is that he seeks to correct an exhibit rather than a transcript. Given the context of the section 2-1401 proceedings, the transcript of the guilty plea proceedings can only be viewed as an exhibit relating to the petition for relief from judgment. In other words, the trial court must take note of that exhibit as a prelude to granting or denying any relief with respect to it. In turn, the reports of proceedings relating to this appeal, as contemplated by Supreme Court Rule 323, are the transcripts of the hearings on the motion to dismiss the petition and on the motion for reconsideration. The only question for this court to determine on appeal is whether the trial court erred in dismissing the section 2-1401 petition, not whether the January 12, 1995, transcript of proceedings is the product of a conspiracy. In essence, defendant is attempting to use Supreme Court Rule 329 as a means of presenting this court with a record different from that presented to the trial court."

The trial court went on to certify the correctness of the transcript on August 21, 1997, while the motion for extension of time was pending in this court and before it had the benefit of this court's September 16, 1997, order. Inasmuch as the trial court cannot amend the January 12, 1995, transcript, which is in the nature of an exhibit filed in support of the motion for relief from judgment, it likewise cannot certify to its correctness.

IT IS THEREFORE ORDERED that defendant's motion to strike certification of correctness shall be, and the same hereby is, GRANTED.